In The

Supreme Court of the United States

ROBERT SIMPSON RICCI, et al.,

Petitioners,

v.

DEVAL L. PATRICK, in his capacity as Governor of the Commonwealth of Massachusetts, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Circuits are split on the deference to be given a district court's interpretation of a consent decree. The First Circuit in this case and the Second, Third, Fifth, Tenth, Eleventh and D.C. Circuits apply a *de novo* standard of review. On the other hand, the Sixth, Seventh, Eighth and Ninth Circuits have given considerable deference to the district court's interpretation of a consent decree which the court either negotiated and fashioned or which it administered over a period of years. And the Fourth Circuit affords special deference to a district court's interpretation of a consent decree in public interest litigation, as in this case. The questions to be examined in this case are as follows:

1. Should any deference be given to the interpretation of a consent decree or any order issued thereunder by a district court which negotiated and fashioned the consent decree and supervised and administered the decree for many years, as the Sixth, Seventh, Eighth and Ninth Circuits have held, as opposed to decisions of the First Circuit in this case and the Second, Third Fifth, Tenth Eleventh and D.C. Circuits which grant no deference to such an interpretation.

2. Did the First Circuit err is refusing to give any deference to the interpretation given to an order issued under a consent decree by a

district court who fashioned, supervised and administered a consent decree for over thirty years in public interest, institutional reform litigation

3. Should deference be given to a decision of the district court interpreting an order issued by it under a consent decree which decision is based upon further factual findings made by the district court?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners: Robert Simpson Ricci, Association for Retarded Citizens of Massachusetts, Inc.; The Paul A. Dever Association for Retarded Citizens, Inc.; Wrentham Association for Retarded Citizens; Disability Law Center, Inc.; Fernald Development Center Class members, Belcherton Plaintiffs; Monsoon Plaintiffs.

Respondents: Deval L. Patrick, in his capacity Governor of the Commonwealth of Massachusetts; Judyann Bigby, in her capacity as Secretary of the Executive Office of Health and Human Services; Elin M. Howe, in her capacity as Commissioner of the Department of Mental Retardation; Commonwealth of Massachusetts Department of Mental Retardation

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Petitioners Association for Retarded Citizens of Massachusetts, Inc., The Paul A. Dever Association for Retarded Citizens, Inc. and Disability Law Center, Inc. are not-for-profit corporations and as such have no parent corporations nor is there any publicly held corporation that holds ten per cent or more of their stock.

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Petitioners, members of the class in the cases of *Ricci v. Patrick*, Civ. Act. Nos. 72-0469-T, 74-2768-T, 75-3910-T, 75-5023-T and 75-5210-T (D.Mass), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in these proceedings on October 1, 2008, with an amended judgment issued on November 14, 2008.

OPINIONS BELOW

The opinion of the First Circuit is reported at 544 F.3d 8 (1st Cir. 2008) and is reproduced in Appendix A at App. 1-34. The final amended judgment of the Court is unreported and is reproduced in Appendix E at App. 80-81. The opinion of the District Court reopening the Disengagement Order at issue in this case is reported at 499 F.Supp.2d 89 (D.Mass. 2007) and is reproduced in Appendix B at App. 35-45. A subsequent order of the District Court is reported at 535 F.Supp.2d 229 (D.Mass. 2008) and is reproduced in Appendix C at App. 46-47. The Final Order issued by the District Court providing for the disengagement of the court and return of the facilities to management of the Commonwealth authorities (with a provision for reassertion of jurisdiction by the court), is reported at 823 F.Supp. 984, 986-989 (D.Mass 1993) and is reproduced in Appendix D at App. 48-79.

JURISDICTION

The judgment of the Court of Appeals was issued on October 1, 2008. Following a motion for rehearing, the First Circuit issued an amended judgment on November 14, 2008. (App. 80-81). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. and the Fifth and 14th Amendments to the Constitution were at issue in the underlying litigation, but are not implicated in the judgment.

STATEMENT OF THE CASE

The decision below is the latest example of an irreconcilable conflict among all twelve regional courts of appeals on an important and recurring issue of appellate review, namely the review standard to be applied to a district court's interpretation of consent decrees and its own orders springing from such decrees. All twelve regional courts of appeals have reached square holdings on the issue, and the only touchstone among them is deep division. The First Circuit, here, like several other courts (including the Second, Third, Fifth, Tenth, Eleventh and D.C. Circuits) have held that pure *de novo* review

applies. Others (including the Sixth, Seventh, Eighth and Ninth Circuits) apply a deferential review standard depending on whether the district court entered the original consent decree or administered it over a long period of time. Other Circuits (including the Fourth) adopt a more deferential standard in public interest, institutional reform cases. Not only is this Circuit split broad, it is acknowledged. In the very case upon which the court below purported to rely in adopting its *de novo* standard of review, the First Circuit earlier had acknowledged the conflict that existed on this issue. See *F.A.C. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192. n. 4 (1st Cir. 2006),

The abuse of discretion standard is the most appropriate standard to apply because the district court's review is not akin to the interpretation of a contract negotiated between parties at arms length, as the courts who have established a *de novo* review standard have held. Rather, the district court's interpretations are framed by its experience in having closely overseen the litigations for years (decades in this case) and turn upon findings of fact made on the basis of extensive evidentiary hearings, the application of the facts to orders it drafted, and the underlying purpose of the orders and decrees it entered.

The result of the disparate standards applied across the circuits is that materially

different results occur in similar cases. Indeed, had the First Circuit applied abuse of discretion review here or even some deferential review, there would have been no basis to overturn the finding of the District Court that the Commonwealth of Massachusetts had violated its Disengagement Order, thus permitting it to reopen the case and to enforce the underlying consent decree that it had imposed in the preceding years. Because it is clear that the First Circuit's *de novo* review was essential to its decision to reverse the district court, this case presents an excellent vehicle for this Court to resolve the disarray in the lower courts over this recurring issue of federal appellate review. The petition should be granted.

PROCEDURAL BACKGROUND

A. Underlying Litigation

A class action was filed in the District of Massachusetts in 1972 on behalf of the mentally retarded residents at Belchertown State School, one of the state mental retardation facilities. Similar suits were filed in the next three years involving other state facilities, including, in 1974, the Fernald Development Center in Waltham, Massachusetts. The basis of the suits was that services, programs and conditions at the facilities were so inadequate that they violated the residents' constitutional and statutory rights under the federal Rehabilitation Law and the Social Security Act. All of the cases

were assigned to District Court Judge Joseph L. Tauro, who consolidated the five institutional cases. In 1977, the parties entered into a consent decree, crafted by Judge Tauro, requiring the Commonwealth to improve the physical facilities and employ additional professional and direct care staff to operate and maintain the facilities in a manner consistent with the standards imposed by Title XIX of the Social Security Act. See *Ricci v. Callahan*, 97 F.R.D. 737 (D. Mass. 1983).

B. The District Court Administers the Consent Decree

The consent decree was administered by Judge Tauro thereafter. For the next several years, Judge Tauro made numerous on-site visits to all the mental retardation facilities; conducted frequent extensive hearings; issued several orders; established a quality control mechanism, staffed by, and responsible to, the District Court, and he effectively managed all services related to, and required for, the mentally retarded residents. See 576 F.Supp. 415 (D. Mass. 1983), 646 F.Supp. 378 (D.Mass 1986). 781 F.Supp. 826 (D. Mass. 1992), 1992 WL 163215 (D. Mass. June 24, 1992), 1992 WL 175509 (D.Mass July 21, 1992). Some of those orders were reviewed by the First Circuit. See *Massachusetts Association for Retarded Citizens v. King*, 643 F.2d 899 (1st Cir. 1981)(refusing to review monitoring orders issued by district court); *Massachusetts Association for Retarded Citizens v. King*, 668

F.2d 602 (1st Cir. 1981)(reversing District Court decision invalidating new state law on charge-for-care); *Ricci v. Okin*, 978 F.2d 764 (1st Cir. 1992)(Breyer, J.)(refusing to review interlocutory order of District Court);

C. The District Court Issues a Disengagement Order

In 1993, the district court issued a final disengagement order, returning management of the mental retardation facilities to the state of Massachusetts, noting the progress that had been made in improving the facilities, due to federal court supervision. (See Appendix D, App. 48-79).

The District Court then issued an order supplanting and replacing each of the consent orders that it had previously issued. See App. 53. Central to the Final Order were requirements that each resident be afforded an individual service plan ("ISP"). The court stated:

> 2.. . . (a) Defendants shall substantially provide services to each class member on a lifetime basis. The specific services to be provided to each class member to meet this obligation, and defining this obligation, shall be set forth in an Individual Service Plan ("ISP") that details each class member's capabilities and needs for services, pursuant to the regulations governing the preparation of

> ISP's, as currently set forth in 104 CMR 20, , *et seq.* (the "ISP Regulations") (App.54)

The order also required that certain steps must be taken before any patient is transferred to another facility.

> 4. Defendants shall not approve a transfer of any class member out of a state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent community region) certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that all ISP-recommended services for the individual's current needs as identified in the ISP are available at the new location. (App. 57)

The Commonwealth defendants were ordered not to "undermine the progress achieved during the period of this litigation." In particular they were required to "maintain[] and implement[] the basic principles of the ISP." (App. 58)

Further, Judge Tauro crafted a provision in the Disengagement Order to allow the District Court to reassert jurisdiction if the

Commonwealth failed to follow the requirements in the Order:

> 7. a. If the defendants substantially fail to provide a state ISP process in compliance with this Order, or if there is a systemic failure to provide services to class members as described in this Order, the plaintiffs may seek enforcement of the Order pursuant to this paragraph. Individual ISP disputes shall be enforced solely through the state ISP process. (App. 59-60).

D. The District Court Finds Its Disengagement Order Violated and Reasserts Its Jurisdiction

In 2003, the Commonwealth announced its plan to close the Fernald Development Center together with all other Department of Mental Retardation ("DMR") development centers and to move the residents to five other residential facilities or to a community based setting.

In 2006, after numerous residents had been voluntarily transferred from Fernald to other DMR facilities and community residences, Petitioners sought relief from the District Court, in accordance with the Final Order, claiming that the Commonwealth had failed to provide a proper ISP procedure in accordance with that Order.

The District Court preliminarily enjoined the Commonwealth from transferring any more residents from Fernald, pending further investigation. Without reopening the underlying case, the District Court appointed U.S. Attorney Michael Sullivan as court monitor to investigate and prepare a report on the voluntary transfers of Fernald residents to other Commonwealth facilities or community residences.

After more than a year of "exhaustive and meticulous study" of all alternative facilities, the Court Monitor concluded in a March 6, 2007 report that "Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an 'equal or better' service outcome." (App. 37-38).

The District Court reviewed the court monitor's report and the Monitor's conclusion that "for some Fernald residents, a transfer 'could have devastating effects that could unravel years of positive non-abusive behavior,'" (App. 39-40). The District Court concluded that "the Commonwealth's stated global policy judgment that Fernald should be closed had damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis." (footnote omitted)(App. 39).

On that basis, the District Court found that the Commonwealth had engaged in a

"'systemic failure' to provide a compliant ISP process," reasserted jurisdiction over the case and issued a mandatory injunction to remedy this failure: (App. 40). He issued the following order:

> Any further communication from defendant Commonwealth of Massachusetts Department of Mental Retardation to Fernald residents and their guardians which solicits choices for further residential placement shall include Fernald among the options which residents and guardians may rank when expressing their preferences. (App.42)

Explaining the importance of the ISP process, the District Court stated:

> An essential function of the ISP process is to give residents and guardians a voice in important decisions. It is intended to provide an individual and personalized analysis of each resident. Administering this process under the global declaration that Fernald will be closed, however, eviscerates this opportunity for fully informed individualized oversight. To dismiss the benefit of hearing the voices and wishes of those most directly impacted invites the devastating effects about which the Monitor has warned. The DMR declaration not only disenfranchises the

> participants in the ISP process, it also deprives the DMR itself of valuable information, thereby undermining the efficacy of the ISP process. As a consequence, such administration of the ISP process amounts to a "systemic failure" to provide a compliant ISP process, within the meaning of the Final Order (App. 40).

The District Court explained why the decision to close Fernald and exclude it as a possible continued alternative for Fernald residents was a "systemic failure."

> As this court oversaw entry of the Final Order, it is uniquely competent to declare that "systemic" simply was intended to have its plain dictionary meaning-"of or relating to a system." Webster's II New College Dictionary 1120 (2001). Accordingly, a systemic failure need not be catastrophic in and of itself. Rather, it may simply be a problem of any magnitude, which manifests itself on a system-wide basis, across a number of ISP processes (App. 41).

Judge Tauro's decision did not mandate that Fernald be kept open indefinitely but simply required that the residents and their guardians be permitted to participate in the ISP process in the manner mandated in the 1993 Final Order. It allows the residents and their

guardians to express a preference to remain at Fernald when the DMR solicits choices for further residential placements, and it mandates that Fernald be part of the discussion in the ISP process for families that express such a preference. That is, rather than simply ranking the choices offered by the DMR, the resident or guardian may, under Judge Tauro's order, express an opinion as to whether any proposed transfer would meet or fail to meet the equal or better standard and would provide all ISP mandated services for that resident. To the extent that the ISP process, prior to the August 2007 order, omitted Fernald as a choice in the placement discussion, that process effectively failed to consider whether the proposed transfer is or is not opposed by the resident or guardian. It also failed to provide an opportunity to consider whether any proposed alternative placement would meet the "equal or better" standard and would provide all ISP mandated services compared to Fernald.

Ultimately, the Court pointed out, the preference of a resident or guardian to remain at Fernald may not carry the day, and Judge Tauro made it clear that he was "simply ensuring that the DMR use the ISP process to adequately assess whether the setting is appropriate *and* whether it 'is not opposed by the affected individual.'" (App. 43). His order restored to the ISP process the right of the resident or guardian to be heard, it effectively provides the required constitutional safeguards, and it mandates that

the DMR demonstrate that any alternative placement meets the "equal to or better" standard and that all ISP mandated services be provided. It does not give families absolute veto power over any proposed transfer or the ultimate closure of Fernald.

E. The First Circuit Decision

On appeal, the Court of Appeals found that there was no basis for the District Court to reassert jurisdiction in this case.

First, the Court established the legal rule to apply in cases of this kind.

> The terms of the consent decree embodied in the Disengagement Order, like any contract construction issue, present an issue of law that we review *de novo*. *See generally F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192 (1st Cir. 2006). Our view of the proper construction is different from the district court's. (App. 21)

Reviewing the District Court decision *de novo*, it concluded that the order reasserting jurisdiction was incorrect. It noted that the Final Order contemplated that the DMR would be able to close institutions (par. 7(b), (App. 22) and in fact several DMR facilities were consolidated and some were closed (App. 22).

The Court of Appeals also found that there was no systemic failure by the DMR to "discharge its ISP duties for any Fernald resident between 2003 . . .and 2007" (App. 23). It rejected the District Court's conclusion that the closing of Fernald constituted a systemic failure under the terms of the Final Order. The Monitor and the Court had already accepted the transfer of 49 residents of Fernald, "it cannot follow that the fact of the announcement caused a systemic failure." (App.24).

The Court of Appeals concluded that the removal of one of several available residential facilities does not mean that there was a failure of the ISP process: "the ISP process focuses only on the services a resident is to receive; the ISP process does not specify where those services are to be delivered." (App. 25). The Court of Appeals rejected the District Court's conclusion that categorically rejecting Fernald as a possible alternative, undermined the ISP process. Other residential facilities could be adequate. "Under the Disengagement Order, the question of whether a transfer will result in an equal or better placement is separate from the question whether the Commonwealth has correctly implemented the ISP process." (App. 26)

If individual Fernald residents are concerned that the ISP process will not result in their receiving equal or better service, then the solution, according to the Court of Appeals, is to request a conference and an adjudicatory

hearing in state court, pursuant to the Final Order.

> If in an individual case there is a failure to provide through the ISP process "an individualized and personalized analysis of each resident," a concern expressed by the district court, then the remedy is provided by state regulations, which inform the ISP process. . . . This concern then, does not satisfy the conditions for reopening the decree or warrant federal intervention in state proceedings. (App.28)

On that basis, it reversed the decision of Judge Tauro reopening the consent decree and applying the Disengagement Order. It concluded:

> The issue this court decides concerns the limits on the jurisdiction of the federal courts. We do not decide the issue of what path best serves the interests of the residents of Fernald and the other parties who have a stake in this matter. People of good faith can and do passionately differ about the Commonwealth's intention to close the Fernald Center. We hold only that the district court lacked authority to reopen the consent decree in this case and that it lacked jurisdiction on that or any other basis to reopen and to enter the orders it did. (App. 33-34)

REASONS FOR GRANTING THE WRIT

Review Is Warranted To Resolve a Conflict That Divides All Twelve Regional Courts Of Appeals Regarding the Correct Standard Of Review Of Fact-Bound Consent Decrees.

A. There is a Split in Authority Among the Circuits as to What Deference Should be Given to the Interpretation of a Consent Decree by the District Court Which Negotiated the Decree and/or Administered That Decree for Many Years.

The question what standard of review applies to a district court's interpretation of a consent order has divided the courts of appeal around the country, largely because this Court has itself given conflicting signals as to the proper standard. Thus this Court wrote in *United States v. ITT Continental Baking Co*, 420 U.S. 223, 238 (1975) that ". . . a consent decree or order is to be construed for enforcement purposes basically as a contract," thus suggesting that a *de novo* standard should be applied. However, elsewhere this Court has acknowledged the importance of a district court's interpretation of a decree that it helped fashion and administer. In *United States v. Atlantic Refining*, 360 U.S. 19, 23-24 (1959), this Court noted:

> We merely hold that where the language of a consent decree in its normal meaning

> supports an interpretation; where that interpretation has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start; and *where the trial court concludes that this interpretation is in fact the one the parties intended*, we will not reject it simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place. (emphasis added).

This Court recognized the dual nature of consent decrees in *Local No. 93, International Association of Firefighters AFL-CIO v. City of Cleveland*, 478 U.S. 501, 519 (1986).

> To be sure, consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts [citations omitted]. More accurately, then, as we have previously recognized, consent decrees "have attributes both of contracts and of judicial decrees," a dual character that has resulted in different treatment for different purposes [citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-237, (1975)]

That "dual character" has produced a major split in the Circuits on the deference to be given a district court's interpretation of the consent decree.

1. The Fourth, Sixth, Seventh, Eighth and Ninth Circuits Apply a Deferential Rule.

At least five other Circuits have concluded, contrary to the decision below, that considerable deference must be given to the court's interpretation of a consent decree that was fashioned by the district court judge and/or administered by him or her over a period of time, particularly in public interest litigation.

The Sixth Circuit has adopted a "deferential *de novo*" standard for review of a consent decree, depending on whether the district judge interpreting the consent decree was involved in the original negotiation of that decree. The Court explained:

> Where as here, though, we are reviewing the interpretation of a consent judgment by the district court that crafted the consent judgment, it is probably more accurate to describe our standard of review as "deferential *de novo*" It is only sensible to give the court that wrote the consent judgment greater deference when it is parsing its own work. As this Court has noted: "[a]t first blush, giving

> substantial deference to the district court's interpretation of the [consent] decree appears to be inconsistent with *de novo* review. Yet, in *Brown v. Neeb*, 644 F.2d 551, 558 n. 12 (6th Cir.1981), we explained that the district court's reading of the decree was merely an additional tool for contract interpretation." *Huguley v. General Motors Corp.*, 52 F.3d 1364, 1369-70 (6th Cir.1995). As the Court noted in *Brown*, "[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it." 644 F.2d at 558 n. 12. We agree, and we will review the district court's decision accordingly.

Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 371-72 (6th Cir. 1998)

In this case, it was the "the court that wrote the consent judgment" that is now interpreting the meaning of that decree. Under those circumstances the interpretation made by that judge "should be given greater deference" since it "is parsing its own work."

The Seventh Circuit has also adopted the proposition that deference must be given to the interpretation of the consent decree by the judge who negotiated and crafted the decree. Thus it noted in *United States v. Alshabkhoun*, 277 F.3d 930, 933-34 (7th Cir. 2002):

> Because a consent decree is a form of contract, we generally review a district court's interpretation of the consent decree *de novo*. . . . However, where, as here, the district court oversaw and approved the consent decree, we give "some deference" to the district court's interpretation. *Id.*

Judge Posner explained why deference should be given to judges who were present from the beginning in the formation of a consent decree. See *Foufas v. Dru*, 319 F.3d 284, 286 (7th Cir. 2003): "When a judge is interpreting his own order, such as a consent decree that he entered, his interpretation is entitled to greater weight than when he is interpreting a contract with the formation of which he had nothing to do."

The Eighth Circuit has held in *United States v. Knote*, 29 F.3d 1297, 1300 (8th Cir. 1994): "We therefore give a large measure of deference to the interpretation of the district court that actually entered the decree."

In this case, there is no doubt that the District Court did participate in the fashioning of the decree. The Court explained:

> For the past two decades, literally thousands of hours have been devoted to fashioning a comprehensive remedial program that has included multi-million dollar capital improvements, establishment of a responsible program of

> community placement, as well as significant staffing increases geared to meeting the individual service plans and overall needs of those with mental retardation.
>
> The result is that, working together, we have created an environment for persons with mental retardation that is now characterized by human dignity and opportunity for growth. And we have done so in a way that consistently ensured a full measure of value for every tax dollar spent.
>
> Given this progress, and the demonstrated good will and dedication of Governor Weld to the mission of safeguarding the health, safety and well-being of people with mental retardation, I am today signing a comprehensive Order closing the federal court's oversight of these cases (App. 50-51).

In addition, considerable deference has been given by other courts to the interpretation of a consent decree if the district court has supervised and administered the decree over a long period of time, as in this case.

Thus the Ninth Circuit held in *United States v. FMC Corp.*, 531 F.3d 813, 818-19 (9th Cir. 2008):

> We review *de novo* the district court's interpretation of a consent decree. *Gates v. Gomez,* 60 F.3d 525, 530 (9th Cir.1995). We generally "give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal." *Id.* (internal quotation marks omitted).

See also *Officers for Justice v. Civil Service Commission for the City and County of San Francisco,* 934 F.2d 1092, 1094 (9th Cir. 1991): "We review *de novo* the district court's interpretation of the consent decree. . . . However, we give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal." *See also Nehmer v. Veterans Administration.* 284 F.3d 1158, 1160 (9th Cir. 2002)(applying test).

That is precisely the situation before the Court now, and the Ninth Circuit rule should be adopted.

Even within the circuits, they sometimes apply one rule (*de novo*) and then in other situations, they apply the other (deferential).

Thus the Court of Appeals in this case cited an earlier case *F.A.C., Inc. v. Cooperativa de Seguros de Vida de Puerto Rico,* 449 F.3d 185 (1st Cir. 2006) for the proposition that the

interpretation of a consent order "presents an issue of law that we review *de novo*." In fact, the cited case states just the opposite. The Court noted in that case:

> The law is a shade unsettled as to the standard of review we should apply-specifically, as to what weight, if any, is to be given to the district judge's construction of a settlement agreement or consent decree. Our own precedent, perhaps surprisingly, suggests that in this circuit review of the interpretation of settlement agreements (as well as consent decrees) is ordinarily *de novo*. But our precedents also recognize that this cannot be a hard and fast rule. *See Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1337-38 (1st Cir.1991) (exception for "public interest" consent decrees).

449 F.3d at 192.

In the *F.A.C.* case, the court added :

> The present situation -- *no evidentiary hearing but personal knowledge by the judge based on his judicial participation in negotiations -- argues for some deference.* Indeed, some of our cases say that an exception may exist where the district judge has "special knowledge concerning the parties' intentions." *Navarro-Ayala*, 951 F.2d at 1339 n. 17; *cf. Malave v.*

> *Carney Hosp.,* 170 F.3d 217, 221 (1st Cir.1999). We think this is only common sense.
>
> Showing even the mildest deference, it is easy to sustain the district court's construction of the settlement. (emphasis added). 449 F.3d at 192

The *F.A.C.* court noted that in "public interest" litigation, deference is often given to the interpretation of a consent decree by the district court. Other courts have come to the same conclusion. The Court of Appeals in *Thompson v. United States Department of Housing and Urban Development*, 404 F.3d 821, 827 (4th Cir. 2005) noted the special role of the district court in institutional litigation:

> The rule of broad discretion in public interest cases is designed *to give the district court flexibility in deciding exactly how the numerous conditions of a complex consent decree are to be implemented in practice.* In overseeing broad institutional reform litigation, the district court becomes in many ways more like a manager or policy planner than a judge. *Over time, the district court gains an intimate understanding of the workings of an institution and learns what specific changes are needed within that institution in order to achieve the goals of the consent decree.* (emphasis added)

That is precisely the situation here. The district court must be given great deference "*in deciding exactly how the numerous conditions of a complex consent decree are to be implemented in practice.*" The District Court in this case has indeed gained "*an intimate understanding of the workings of an institution and learns what specific changes are needed within that institution in order to achieve the goals of the consent decree.*" Yet the Court of Appeals paid no attention whatsoever to his conclusions on that issue.

Thus in view of the fact that Judge Tauro fashioned and entered the consent decree in this institutional reform case and administered and supervised the decree over 16 years, considerable deference should have been given to his interpretation of the decree and the orders issued pursuant to that decree.

2. The First Circuit (in this case) and the Third, Fifth, Tenth, Eleventh and D.C. Circuits Apply a Strict *Do Novo* Rule in Interpreting a Consent Decree

The reason for the opposite *de novo* review standard was explained by the D.C. Circuit. It held in *Richardson v. Edwards*, 127 F.3d 97, 101 (D.C. Cir. 1997): "We customarily review decisions interpreting consent decrees and the agreements underlying them *de novo*, in the

same manner as we review decisions interpreting contracts. . . . . We do so because a consent decree is a form of contract."

Consent decrees are like contracts, the Court held, since usually both are documents that the district court had no role in creating. "It is approved on its face by a court presumably not privy to the details of negotiation, or the parties' subjective intentions. . . . But ultimately the question for the lower court, when it interprets a consent decree incorporating a settlement agreement, is what a reasonable person in the position of the parties would have thought the language meant. .. . . That too is the question on appeal and it is a question of law, which is why review is *de novo.*" 127 F.3d at 101.

But if a district court was "privy to the details of negotiation or the parties' subjective intention" and further interpreted and applied the consent decree over a long period of time, then the *de novo* rule should not be applied, as many other courts have held.

Other circuits have also adopted the "consent decree is a contract" rule The Second Circuit has held: "We review a district court's interpretation of a settlement agreement *de novo* ... mindful that the consent decree is a contract between the parties, and should be interpreted accordingly," *Tourangeau v. Uniroyal, Inc.*, 101 F.3d 300, 307 (2d Cir.1996); see also *Barcia v. Sitkin*, 367 F.3d 87 (2d Cir. 2004)(same).

The Fifth Circuit held that "the district court's interpretation of the terms of a consent decree, including whether the decree is ambiguous, is reviewed *de novo*." *Walker v. U.S. Department of Housing and Urban Development*, 912 F.2d 819, 825 (5th Cir. 1990).

Similarly, the Tenth Circuit has held, that "We construe the terms of a consent decree *de novo* using traditional principles of contract interpretation." *Joseph A. ex rel. Corinne Wolfe v. Ingram*, 275 F.3d 1253, 1266 (10th Cir. 2002)

The Eleventh Circuit concurred with this analysis in *Reynolds v. McInnes*, 338 F.3d 1201, 1211 (11th Cir. 2003): "We apply the same rules that govern contract interpretation when we interpret a consent decree, because a consent decree is essentially a form of contract."

The Third Circuit held in *Holland v. New Jersey Dep't of Corrections*, 246 F.3d 267, 277-278 (3d Cir.2001), that "a district court's construction and interpretation of a consent decree is subject to straightforward plenary or *de novo* review," citing a series of earlier Third Circuit cases that uphold such a standard.[1] It

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[1] *See e.g., Washington Hosp. v. White*, 889 F.2d 1294, 1299 (3d Cir.1989)(*de novo* review applied) See also *McDowell v. Philadelphia Housing Authority*, 423 F.3d 233, 235 (3d Cir. 2005)(Alito, J)(court of appeals must interpret the "plain

rejected the "deferential *de novo*" standard adopted by many other circuits as an "oxymoron."

> We also think that the Third Circuit position is the more reasonable one, because the concept of "deferential *de novo*" (or "deferential plenary") review seems to be an oxymoron. Black's Law Dictionary defines "*de novo*" as "[a]new, afresh, a second time," and defines "plenary" as "[f]ull, entire, complete, absolute, perfect, unqualified." Black's Law Dictionary 392, 1038 (5th ed.1979). These are, of course, familiar notions to appellate judges, the sinews of our everyday work. It strains imagination to conceive how our review could be both "anew, complete, absolute and unqualified," while at the very same time deferential to the District Court's interpretation. Review that gives deference to the decision that is under review is simply not absolute and unqualified review. The courts that apply "deferential *de novo*" do not explain how they amalgamate these two seemingly incompatible standards. We decline to follow these other courts and instead adhere to the long tradition in this Circuit

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text" of the decree).

> of reviewing a district court's interpretation of a consent decree *de novo.*

In view of the split in the Circuits described above, review should be granted.

Secondary sources have noted the conflict in this area:

> As with any other contract, interpretation of a consent decree is a question of law, and thus the appellate court reviews the order *de novo.* Appellate courts recognize a variation of the standard rule of *de novo* review for consent decrees in instances where interpretation involves a fact-dependent legal standard, or supervision of litigation, particularly in a public law context. Thus, while a trial court's views on the construction of consent judgments are entitled to deference, the interpretation of a consent judgment's provisions are a matter of law subject to full review on appeal. However, there is authority that a court reviews a trial court's construction of such an agreement as an issue of fact subject to the clearly erroneous standard. In such circumstances, a trial court may be better positioned to decide the issue in question, therefore warranting deferential review. [citations omitted]

46 *American Jurisprudence,* 2d Judgments

(2008), § 196

See also James Lindsay Freeze, "United States v. Western Electric; The Deference Difference," 21 *Cap. Univ. L. Rev.* 321 (1992)(explaining different standards applied by the Circuits on the deference to be given district court's interpretation of a consent decree).

B. Deference Must be Given to a District Court's Interpretation of a Consent Decree When It is Based upon New Factual Findings

In addition, some courts have adopted a more deferential rule if the district court's interpretation of a consent decree is based on factual findings.

Thus the Second Circuit has held that a Court of Appeals reviews the meaning of a consent decree *de novo*, but it adds that any factual findings made by the district court can only be reviewed for "clear error." See *United States v. Broadcast Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001).

See also *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transit Authority*, 263 F.3d 1041, 1048 (9th Cir. 2001):

> This court reviews de novo the district court's interpretation of the consent decree, *but must defer to the district*

> *court's factual findings underlying the interpretation unless they are clearly erroneous.* (emphasis added) [2]

In this case, factual findings were made by the Court Monitor to the effect that "Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an 'equal or better' service outcome." (App.38). Yet no deference was made by the Court of Appeals with respect to that factual finding adopted by the District Court.

To the extent that Judge Tauro's order could be considered a modification of the Disengagement Order, great deference is generally awarded to such modification. The Fourth Circuit has explained in *Thompson v. United States Department of Housing and Urban Development*, 404 F.3d 821, 827 (4h Cir. 2005)

We review the district court's decision to

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[2] The Court added: "We must "give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal." *Gates* [*v. Gomez*], 60 F.3d [525] at 530 [9th Cir. 1995] (quoting *Officers for Justice v. Civil Serv. Comm'n*, 934 F.2d 1092, 1094 (9th Cir.1991)). *Id.*

> modify the Consent Decree for abuse of discretion, *see Thompson I,* [*v. HUD]* 220 F.3d [241,] at 246 [(4th Cir. 2001)] , and "we accept the factual findings on which the district court's decision is based unless they are clearly erroneous," *Small v. Hunt,* 98 F.3d 789, 796 (4th Cir.1996). Such a deferential standard of review is warranted in view of the nature and purpose institutional-reform consent decrees:

Id. (emphasis added).

Thus under any of the standards applied by the courts, some deference must be given to the district court's interpretation of the consent decree and the Disengagement Order. Even assuming that some courts have adopted a *de novo* standard, there is certainly a split in the Circuits over the proper deference that must be given to the district court's interpretation. Certainly there is some deference given to a district court's interpretation of a consent decree that it originally entered. Even more deference is given if the district administered the consent decree over a long period. This is certainly true in institutional reform litigation, which is present here. This Court should grant review to resolve that conflict.

D. The First Circuit Erred In Holding That It Could Interpret the Disengagement Order Issued Pursuant to the Consent Decree *De Novo* With No Deference To the District Court's Interpretation Of Its Own Order.

The Court of Appeals held that it could interpret the Disengagement Order with no deference to the analysis made by the District Court which issued the order. This is contrary to the decision of many Circuits that hold that *orders* issued pursuant to the consent decree (as opposed to the decree itself) are subject to a different standard. In this case, the Disengagement Order -- the decision of the district court to remove federal court supervision of the mental retardation facilities and to return management of the facilities to state bodies -- was completely crafted by the District Court judge. As the district court explained:

> As this court oversaw entry of the Final Order, it is uniquely competent to declare that "systemic" simply was intended to have its plain dictionary meaning-"of or relating to a system." (App. 41).

Many courts, including the First Circuit, have agreed with the proposition that "the district court is in the best position to explain the meaning of its own order." *Aranov v. Chertoff*, 536 F.3d 30, 38 (1st Cir. 2008). See also *Harvey v. Johanns*, 494 F.3d 237, 242 (1st Cir.2007) ("We must, of course, accord deference to the district

court's interpretation of the wording of its own order"); *see also Lefkowitz v. Fair*, 816 F.2d 17, 22 (1st Cir.1987) ("[U]ncertainty as to the meaning and intendment of a district court order can sometimes best be dispelled by deference to the views of the writing judge.").

Other courts have come to the same conclusion, even those courts which purportedly apply a *de novo* standard to the interpretation of the consent decree itself. See *SEC v. Sloan*, 535 F.2d 679, 681 (2d Cir.1976) (finding "no basis for substituting our judgment for that of the district judge in interpreting his own order"), *In re Cintra Realty Corp.*, 373 F.2d 321, 322 (2d Cir.1967) (expressing "satisf[action] with [district judge's] interpretation of his own order" "[e]ven if the order be deemed ambiguous"); *Gibbs v. Frank*, 500 F.3d 202, 2006 (3d Cir. 2007)("We review a district court's interpretation of its own order for abuse of discretion"); *United States v. Moussaoui*, 483 F.3d 220, 231 (4th Cir. 2007)("a district court's interpretation of its own order is for obvious reasons afforded great weight"); *Kendrick v. Bland*, 931 F.2d 421, 423 (6th Cir.1991)(stating that a district court's interpretation of its own order containing the phrase "major violations of the consent decree" "is certainly entitled to great deference"); *Hastert v. Illinois State Board of Election Commissioners*, 28 F.3d 1430, 1438 (7th Cir. 1994)(the court's interpretation of its order will not be disturbed "absent a clear abuse of discretion"); *Graefenhain v. Pabst Brewing Co, Inc.*, 870 F.2d 1198 (7th Cir. 1989)("To the extent

Pabst's argument is premised on the district court's misinterpretation of one of its own orders, Pabst faces an equally heavy burden -- the district court's interpretation will not be upset unless it constitutes a clear abuse of discretion, since "[f]ew persons are in a better position to understand the meaning of a [court order] than the district judge who oversaw and approved it." *United States v. Board of Educ.*, 717 F.2d 378, 382 (7th Cir.1983)); *United States v. Soderling*, 958 F.2d 1222, 1992 WL149562 *3 (9th Cir. 1992)("We defer to the district court's interpretation of its own orders.") *Kendrick v. Bland*, 931 F.2d 421, 423 (6th Cir.1991)(stating that a district court's interpretation of its own order containing the phrase "major violations of the consent decree" "is certainly entitled to great deference"); *Cave v. Singletary*, 84 F.3d 1350, 1354-55 (11th Cir.1996) ("The district court's interpretation of its own order is properly accorded deference on appeal when its interpretation is reasonable."); *Nix v. Billington*, 448 F.3d 411, 414 (D.C. Cir. 2006)("district court's interpretation and enforcement of its own orders is typically subject to review only for abuse of discretion"); *Sims v. Johnson*, 505 F.3d 1301, 1305 (D.C. Cir. 2007)("The district court's interpretation and enforcement of its orders is entitled to deference, for our review is limited to determining whether there was an abuse of discretion"); *Amado v. Microsoft*, 517 F.3d 1353, 1358 (Fed. Cir. 2008)("A district court's interpretation of its order is entitled to deference unless the interpretation is unreasonable or is

otherwise an abuse of discretion.")

Here the First Circuit ignored this well-accepted proposition, established not only by prior decisions in its own Circuit, but in the 2d, 3rd, 4th, 6th, 7th, 9th, 11th and the D.C. and Federal Circuits as well. It held that orders issued pursuant to a consent decree should be subject to the same analysis as the decree itself, a conclusion that many other courts have rejected. That issue is of prevailing importance in the administration of the federal courts, not merely in the context of institutional litigation. This Court should therefore grant the writ and examine this issue.

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari.

Dated: New York, N.Y.
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APPENDIX A

First Circuit Decision

United States Court of Appeals, First Circuit.
Robert Simpson RICCI, et al., Plaintiffs, Appellees,
v.
Deval L. PATRICK, in his capacity as Governor of the Commonwealth of Massachusetts, et al., Defendants, Appellants.
Massachusetts Association for Retarded Citizens, Inc., a/k/a Arc/Massachusetts, Inc., et al., Plaintiffs, Appellants,
Disability Law Center, Inc., Intervenor, Appellant,
v.
Deval L. Patrick, in his capacity as Governor of the Commonwealth of Massachusetts, et al., Defendants, Appellants.

Nos. 07-2522, 07-2523.

Heard Sept. 3, 2008.
Decided Oct. 1, 2008.

Before LYNCH, Chief Judge, SELYA, Circuit Judge, and SCHWARZER, [FN*] District Judge.

FN* Of the Northern District of California, sitting by designation.

LYNCH, Chief Judge.

The Governor of Massachusetts and the state Department of Mental Retardation ("DMR") appeal from an order of a federal district court which both reopens a 1993 consent decree and then requires them to take certain steps as to the residents of the Fernald Developmental Center. *Ricci v. Okin* (*Ricci IV*), 499 F.Supp.2d 89 (D.Mass.2007). Appellants, whom we shall call the Commonwealth, deny that the court had any authority to reopen the consent decree or otherwise issue any orders.

The Commonwealth characterizes the order as essentially prohibiting it from relocating residents as it attempts to close the Fernald Developmental Center. The Fernald Center, some 160 years old, has been the residence of over 180 mentally retarded residents committed to the care of the Commonwealth. The Commonwealth announced, in 2003, its intention to move these residents to one of the five other residential facilities or to a community based setting, whichever comports best with each resident's individual service plan ("ISP"). The Commonwealth has committed itself to transferring residents only if the Superintendent at Fernald "certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location." *Ricci v. Okin* (*Ricci III*), 823 F.Supp. 984, 987 (D.Mass.1993). The Commonwealth did transfer, in fact, some 49 Fernald residents before February 8, 2006.

The federal district court, which has conscientiously and with great care presided over institutional reform litigation concerning these mentally retarded persons since 1972, *see generally Ricci v. Okin* (*Ricci I*), 537 F.Supp. 817, 819 (1982), closed the underlying case in 1993 pursuant to a consent decree whose terms it adopted into a court order known as the Disengagement Order, *see Ricci III*, 823 F.Supp. at 986-89.

Nonetheless, in 2006, the court enjoined the Commonwealth from transferring any more residents on the motion of a class of Fernald residents alleging violation of the decree. *Ricci v. Okin*, Nos. 72-0469-T, etc. (D.Mass. Feb. 8, 2006) (order freezing resident transfers and appointing court monitor). The court found that it had authority under the 1993 Disengagement Order to investigate whether, as the plaintiffs alleged, the Commonwealth was violating the Disengagement Order. The court appointed a monitor, the U.S. Attorney for Massachusetts, to investigate and prepare a report. The court asked the monitor's report to address "whether the past and prospective transfer processes employed by the Department of Mental Retardation comply with federal law, state regulations, as well as the orders of this court." *Id.* The district court's authority to investigate the allegations of violation is not at issue.

After receiving the report, the court, in an

order dated August 14, 2007, found that the conditions for reopening the case contained in the Disengagement Order had been met. It also issued a further remedial order, the specific terms of which we describe later. *Ricci IV,* 499 F.Supp.2d at 92. Those orders are at issue.

The Commonwealth's appeal is from both components of the August 14, 2007 order. The appeal is supported by a number of amici who are of the view that deinstitutionalization is in the best interests of the Fernald residents.[FN1] In addition, the Massachusetts Association of Retarded Citizens, Inc. appeared as a plaintiff-appellant urging reversal. The Disability Law Center appeared as an intervenor-appellant also urging reversal.

> FN1. Amici in support of the Commonwealth are: National Association of State Directors of Developmental Disabilities Services; Association of Developmental Disabilities Providers of Massachusetts; Adlib, Inc.; The Arc of the United States; Boston Center for Independent Living; Independent Living Center of the North Shore and Cape Ann, Inc.; Massachusetts Advocates Standing Strong; Massachusetts Council of Human Service Providers, Inc.; Massachusetts Families Organizing for Change; MetroWest Center for Independent Living, Inc.; National Disability Rights Network; Northeast Independent Living Program;

Service Employees International Union; Local 509 of the Service Employees International Union; Stavros Center for Independent Living; and United Cerebral Palsy.

On the other side, the plaintiffs' arguments to uphold the district court's decision are supported by other amici.[FN2] In addition, the Wrentham Association for Retarded Citizens, Inc. appeared as a plaintiff and appellee on behalf of a class composed of residents at the Commonwealth's Wrentham Developmental Center, stating that in its view, the issues involved in this case affected residents in other state institutions for the mentally retarded such as Wrentham.

FN2. Amici in support of the plaintiffs are: Massachusetts Coalition of Families and Advocates for the Retarded, Inc.; and Voice of the Retarded, Inc.

We review first whether the district court had authority to reopen this case because the Commonwealth violated the Disengagement Order or the residents' constitutional rights and whether the court had authority to reopen on some other basis. Because we conclude there was no basis for the district court to reopen the case or otherwise assert jurisdiction, we do not reach the issues relating to the remedial order. We reverse the district court, vacate its order, and order dismissal of these proceedings for lack of

jurisdiction.

I.

We set forth the factual background for this suit, starting with the events which precipitated these proceedings.

A. *Actions By the Commonwealth Which Led to This Action*

In three budgetary acts from 2004-2007, the Massachusetts legislature directed DMR to take appropriate steps to consolidate or close its six Intermediate Care Facilities for the Mentally Retarded ("ICFs"), including Fernald. Several reasons were articulated. The legislation stated one purpose of the directive was to promote compliance with a Supreme Court decision, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999). That decision, in turn, emphasized the congressional intent in Title II of the Americans with Disabilities Act of 1990 ("ADA") to avoid discrimination against mentally disabled persons by promoting their placement into community settings. Another stated purpose was to further the Commonwealth's own established policy of reducing its institutional capacity and of providing services to patients in less restrictive settings. This policy decision was grounded in evidence of prior successful transitions of a number of mentally retarded residents from residential settings, from the past closing of

other ICFs. Further, the Commonwealth was cognizant of national trends toward deinstitutionalization and the need for certainty in planning matters such as personnel placement. The legislature required DMR to reduce capacity at these ICFs, provided that equal or better services for residents could be furnished in community settings.

Another consideration for the Commonwealth was how to use its available resources for the care of the mentally retarded. DMR had received estimates in 2001 for the amount of capital expenditures needed to maintain each ICF. As of 2001, Fernald needed $14.3 million in capital expenditures to repair its infrastructure and $41.2 million to achieve full compliance with the ADA. The Fernald facility was ranked first among the Commonwealth's ICFs in needed capital costs. Indeed, the average daily cost of services at Fernald as of FY 2007 was over $700 per person a day, or $259,000 per person annually.[FN3] By contrast the costs at the other ICFs ranged from $433 to $590 per day. The Fernald per-resident cost was also more than 2.5 times the average annual per-person cost of residential community-based services. In 2007, these were at $280 per day or $102,103 annually per patient, including day programs and transportation services.

FN3. These figures in part reflect the reduced population at Fernald due to the earlier transfers of residents.

As of May 2007, there were 186 Fernald residents living in a facility that once housed nearly 2,000 individuals. The remaining residents included 131 in the profound range of mental retardation, 40 in the severe range, 12 in the moderate range, and 3 in the mild range. Fernald Center residents ranged in age from 36 to 95 years old, with an average age of 57. Some 38 Fernald Center residents were aged 63 or older.

In 2003, as said, the Commonwealth announced its intention to close Fernald by transferring its residents to equal or better care in its other five ICFs or into community based settings, including group homes.[FN4] The Commonwealth planned to keep open at the Fernald campus a 24-person residential unit and a skilled nursing center which can serve 29 individuals. It began its program in 2003 and has successfully transferred 49 of approximately 238 residents. Of these, 35 residents were transferred to other ICFs and 14 were transferred to community residences.

> FN4. This was a general policy announcement, which was not accompanied by a formal timetable to close Fernald.

The efforts of the Commonwealth to make these transfers were brought to a halt in February 2006 when, as described above, the

federal district court, acting at the behest of a purported class of the remaining 189 Fernald residents, enjoined the process pending further investigation.

B. *The History of the Ricci Class Action*

In 1972, residents of the Belchertown State School, a state institution for the mentally retarded, filed a class action against state officials alleging that conditions there violated their constitutional and statutory rights. *See Ricci I,* 537 F.Supp. at 819; *see also Ricci III,* 823 F.Supp. at 985-86. A class action challenge to conditions at Fernald was filed on July 23, 1974. Complaint, *McEvoy v. Goldmark,* No. C.A. 74-2768-T (D.Mass. July 23, 1974). Suits were also filed on behalf of residents of other state institutions. *See Ricci I,* 537 F.Supp. at 819. The actions were consolidated before Judge Tauro of the U.S. District Court for the District of Massachusetts.

After the suits were filed, the court took day-long views of conditions at the facilities. *Ricci I,* 537 F.Supp. at 820. The court determined that the Commonwealth was not providing the constitutionally required minimum level of care. The Commonwealth defendants chose not to dispute this and instead "agreed to work with the plaintiffs and the court to fashion comprehensive remedial programs that would be memorialized in the form of consent decrees." *Id.* The parties entered into separate interim

consent decrees, one for each institution, in 1977, and a consent decree governing personnel in 1978. *Id.* at 820-21.

The district court actively oversaw the implementation of the consent decrees for almost ten years. *See generally Ricci v. Okin,* 978 F.2d 764, 764 (1st Cir.1992). On October 9, 1986, the court entered an order which set out a list of specific tasks for the Commonwealth to accomplish and represented a "step of disengagement" for the court. *Id.* The order contemplated the court's final disengagement after three years, a term that the parties extended by agreement. *Id.* at 764-65.

The class action effectively ended in 1993 when the parties entered into a final consent decree, which the district court adopted in a final Disengagement Order.

C. *The Disengagement Order*

On May 25, 1993, the district court signed an order "closing the federal court's oversight of the[ ] [consolidated] cases." *Ricci III,* 823 F.Supp. at 985. The Disengagement Order, which supplanted and replaced all prior consent decrees and court orders, adopted the parties' final consent decree. Several provisions of the Disengagement Order are important for purposes of these appeals.

First, the Disengagement Order

terminated the court's jurisdiction over the cases. The cases could be reopened and jurisdiction could be asserted only if certain explicit conditions were met. The Order allowed "action[s] to enforce the rights of the plaintiff classes" only when they were brought "pursuant to the terms of paragraph 7" of the Order. *Id.* at 986 (Disengagement Order ¶ 1).

Paragraph 7, in turn, allowed class members to seek enforcement of the Disengagement Order if one or more of three conditions had been met. Plaintiffs were required to show that 1) "defendants substantially fail[ed] to provide a state ISP process in compliance with [the] Order"; 2) defendants engaged in "a systemic failure to provide services to class members as described in [the] Order"; or 3) defendants engaged in "a systemic failure to provide ISP services required by [the] Order." *Id.* at 988 (Disengagement Order ¶ 7). The Order did not, however, allow plaintiffs to reopen "based solely on facts known by them as of the date of [the] Order." *Id.* It also explicitly prohibited plaintiffs from enforcing the Commonwealth's state law obligations in a federal court action.

Second, the Disengagement Order outlined the obligations DMR owes to class members. Under the Disengagement Order, the Commonwealth may not transfer a class member from a state school to a community residence "until and unless the Superintendent of the

transferring school ... certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that all ISP-recommended services for the individual's current needs ... are available at the new location." *Id.* at 987 (Disengagement Order ¶ 4). This commits the decision to transfer a resident of Fernald to the Superintendent of Fernald, who makes the certification.

Review of that certification is not in the federal court, but rather through state administrative procedures. *See generally* 104 Mass.Code Regs. 29.15. Under the applicable regulations, if an individual or guardian objects to the transfer, he or she may file an appeal within 30 days of receipt of the ISP. DMR must attempt to resolve the matter through an informal conference with the client and his or her legally authorized representative. The resident may then petition for a hearing. The individual has the right to be represented at the hearing, to present evidence and call witnesses, and to examine DMR's records. Under state law, "[t]he hearing officer shall determine which placement meets the best interest of the ward giving due consideration to the objections to the placement made by the relative or permanent guardian." Mass. Gen. Laws. ch. 123B, § 3. The objecting party may then seek judicial review of the hearing officer's decision through appeal to superior court. *See* Mass. Gen. Laws. ch. 30A, § 14. There is no claim in this case that the

Superintendent has failed to make such certifications for prior transfers from Fernald or will fail to do so for future transfers.

Third, the Disengagement Order details the Commonwealth's obligations with regard to the ISP process. An ISP details each resident's "capabilities and needs for services" such as medical or psychological care. *Ricci III*, 823 F.Supp. at 986-87 (Disengagement Order ¶ 2(a)); *see generally* 104 Mass.Code Regs. 29.06(2). ISPs are drafted after individual meetings between evaluating professionals and clients and their guardians. *See* 104 Mass.Code Regs. 29.06(2)(b). The Disengagement Order required DMR to comply with state regulations governing ISP planning and mandated that any changes to the Commonwealth's ISP regulations continue to "guarantee that each class member be provided with the least restrictive, most normal, appropriate residential environment." *Ricci III*, 823 F.Supp. at 987 n. 2; *see also* 104 Mass.Code Regs. 29.06(2)(a)(2).

D. *The Motions to Reopen*

The Ricci class members filed a motion to reopen the case in 2004. The Massachusetts Association for Retarded Citizens, Inc. appeared as a class representative for the Wrentham and Dever plaintiff classes, who had not been included in the Ricci class members' motion to reopen but had separately alleged that DMR was not in substantial compliance with the

Disengagement Order. It ultimately filed a notice of appeal from the district court's August 14, 2007 order. As a result, we have two appeals before us from the same district court order. The Ricci class members based their 2004 motion to reopen on the Commonwealth's alleged violation of the Disengagement Order. Specifically, they claimed that the Commonwealth had "substantially failed to provide a state ISP process in compliance with the Order," had engaged in "a systemic failure to provide services to class members as described in the Order," and were "not in substantial compliance with the Order with regard to systemic issues." Motion to Reopen and Restore Case to Active Docket and Enforce the Final Order of May 12, 1993, at 1, *Ricci IV,* 499 F.Supp.2d 89 (D.Mass.2007) (Nos.72-0469-T, etc.).[FN5] As noted, the court appointed a special monitor to investigate the allegations raised in the plaintiffs' motion and their reports to the court.

> FN5. Plaintiff Wrentham Association filed a similar motion on February 7, 2006. The motion contained similar allegations and was premised on similar grounds.

E. *The Monitor's Report*

The court monitor completed a 13-month investigation into the transfers from Fernald between February 26, 2003 and February 8, 2006. The monitor reviewed all of DMR's records for the transferred individuals and interviewed

most of the individuals or their guardians. The monitor also visited the individuals' new placements as well as all of DMR's ICFs and many of the locations for community placement. In addition, the monitor hired independent medical professionals to assess each individual whose transfer was planned, in order to review whether these individuals would receive "equal or better" services in the new location.

The monitor reviewed allegations that DMR had violated the Disengagement Order's requirement that it "certify[ ] that individuals to be transferred will receive equal or better services at their new residences" and "certify[ ] that ISP recommended services for the individual's current needs are available at the new location." The monitor's report concluded that DMR had complied with both obligations.

The report also found DMR to be in compliance with its procedural obligations under state law, such as the requirement it provide notice to guardians forty-five days in advance of a transfer and the requirement that it ensure guardians knew they had a right to visit and examine the proposed homes. The report also found no violations by DMR of federal regulations, such as 42 C.F.R. § 483.12, which governs transfer standards for skilled nursing facilities. Finally, the monitor found no violation of state regulations governing informed consent. *See* 115 Mass.Code Regs. 5.08(1)(a).

In addition, the monitor examined conditions at the Commonwealth's other ICF facilities, to which Fernald residents could be transferred. The monitor concluded that "[e]ach facility currently ha[d] the minimum services, staffing and amenities to provide equal or better services."

The monitor's report also inquired into guardians' assessments of their satisfaction with the resulting placement and their participation in the transfer decision. The monitor reported the results of a survey distributed to guardians of the 49 transferees. Guardians were asked to rate their satisfaction with their wards' placements on a scale of one to five, with one being the most favorable. The results showed 78% rated their satisfaction as a "1," 14% rated their satisfaction a "2," 1% rated their satisfaction a "4," and another 1% rated their satisfaction a "5."

Thus, the monitor's report concluded that the DMR had complied with the Disengagement Order and state and federal law in effectuating past transfers of residents from Fernald.

As to future transfers, the report offered the monitor's opinion that:

> As a result of a year long investigation, our office has concluded that some of the residents at Fernald could suffer an adverse impact, either emotionally and/or physically, if they

> were forced to transfer from Fernald to another ICF/MR or to a community residence.
>
> ... Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an "equal or better" outcome.

Report of Court Monitor Michael J. Sullivan at 27, *Ricci IV*, 499 F.Supp.2d 89 (D.Mass.2007) (No. 72-0469-T) [hereinafter "Monitor's Report"]. The monitor stated his opinion that "residents should continue to have the opportunity and option to move from Fernald to other ICFs, or to a community residence, provided that the Certification Process is enforced" but that "Fernald residents should be allowed to remain at the Fernald facility." The monitor also suggested that Fernald could be changed by reducing the facility's acreage, building new residential units, and consolidating residences.

F. *The District Court's August 14, 2007 Order*

The district court reviewed the monitor's report, affirmed the monitor's finding that there had been no past violation of the Disengagement Order, and agreed that "[f]or some Fernald residents, a transfer 'could have devastating effects that unravel years of positive, non-abusive behavior.' " *Ricci IV*, 499 F.Supp.2d at 91 (quoting Monitor's Report at 24). The court concluded that "the Commonwealth's stated global policy judgment that Fernald should be

closed ha[d] damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis." *Id.* (footnote omitted).

On this basis, the court held that a necessary condition for federal court intervention-that the Commonwealth had engaged in a " 'systemic failure' to provide a compliant ISP process"-had been met. *Id.* at 91. The court issued a mandatory injunction to remedy this failure:

> Any further communication from Defendant Commonwealth of Massachusetts Department of Mental Retardation to Fernald residents and their guardians which solicits choices for further residential placement shall include Fernald among the options which residents and guardians may rank when expressing their preferences.

Id. at 92. The court administratively closed the case and the Commonwealth appealed.

II.

The Commonwealth argues that there was no basis on which the court could assert jurisdiction over the matter and asks that the action be dismissed.[FN6]

> FN6. Even if the district court did have authority, the Commonwealth argues, the

> August 2007 order was improper because: (1) it exceeded the bounds of the 1993 Disengagement Order; (2) it improperly issued a mandatory injunction when neither federal law nor the Disengagement Order had been violated; and (3) it effectively mandated that the Commonwealth keep Fernald open indefinitely, which is beyond the power of a federal court. We do not reach those arguments.

The Commonwealth argues that there are three bases on which the court might have authority to reopen, but says none is present here. Those bases are "the defendants' failure to abide by the terms of the [Disengagement Order]; an ongoing violation of the Constitution; or a significant change in either the factual circumstances or the law." The first basis arises from the terms of the Disengagement Order itself. *See Ricci III,* 823 F.Supp. at 988 (Disengagement Order ¶ 7). The second condition requires that there be a finding of a violation of a federal constitutional provision, thus providing a basis to issue a decree, but the decree "must directly address and relate to the constitutional violation." *Milliken v. Bradley,* 433 U.S. 267, 281-82, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977); *see also Lovell v. Brennan,* 728 F.2d 560, 564 (1st Cir.1984) (noting that a court may exercise continuing jurisdiction in a case if it finds a constitutional violation or the likelihood of a constitutional violation in the near future).

The third and final condition represents the "traditional power of a court of equity to modify its decree in light of changed circumstances," *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004), subject to the strict limits the Supreme Court has imposed for finding such modifications.[FN7]

> FN7. The plaintiffs argue that the court's conclusion that it had authority to reopen can also be justified as an exercise of its "ancillary jurisdiction" or "inherent jurisdiction." We discuss this argument later.

The district court based its authority to issue the order on the first condition: a purported violation under the terms of Paragraph 7 of the Disengagement Order. Plaintiffs urge affirmance on that ground but argue the order is supportable on the other two.

We conclude that the district court does not have authority to reopen the case on any permissible basis. We explain.

A. *Whether the Consent Decree Provided Authority to Reopen the Case*

The Disengagement Order allows class members to seek enforcement of the defendants' obligations in federal court "[i]f the defendants substantially fail to provide a state ISP process" as detailed in the Disengagement Order or "if

there is a systemic failure to provide services to class members." *Ricci III*, 823 F.Supp. at 988 (Disengagement Order ¶ 7). The district court held that the Commonwealth's administration of the ISP process under its global closure policy "amount[ed] to a 'systemic failure' to provide a compliant ISP process" within the meaning of the 1993 consent decree. *Ricci IV*, 499 F.Supp.2d at 91.

The terms of the consent decree embodied in the Disengagement Order, like any contract construction issue, present an issue of law that we review de novo. *See generally F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192 (1st Cir.2006). Our view of the proper construction is different from the district court's.

Several provisions of the Disengagement Order are important. First, the Order plainly contemplated that DMR, in its discretion, would be able to close institutions.[FN8] *Ricci III*, 823 F.Supp. at 987 (Disengagement Order ¶ 5). Second, the Order does not permit state law, including the ISP regulations or review of the Superintendent's certification decision, to become enforceable in the federal court. *Id.* at 988 (Disengagement Order ¶ 7(b)). Thus, the Disengagement Order preserved to DMR the discretion to "allocat[e] its resources to ensure equitable treatment of its citizens without federal court interference." *Id.* at 987 (Disengagement Order ¶ 5).

FN8. In 1993, years before it issued the August 2007 order, the district court recognized the Disengagement Order did not prohibit the closing of any facility. *Ricci III,* 823 F.Supp. at 987 ("[N]othing in this Order is intended to detract from or limit the discretion of the defendants in ... allocating its resources to ensure equitable treatment of its citizens."). It also acknowledged in 1992 that DMR could close any facility. *See Ricci v. Okin* (*Ricci II*), 781 F.Supp. 826, 827-28 (D.Mass.1992) ("The court is not opposed to the eventual closing of Dever or any other [pre-1993] Consent Decree facility."); *see also Ricci IV,* 499 F.Supp.2d at 92 n. 17 ("The court maintains [the position articulated in 1992].").

The defendants' practices under the Disengagement Order, as the monitor found, were consistent with the terms of the Order. In fact, DMR had earlier closed two residential facilities, the Dever School in 1992 and the Belchertown School in 2002. The parties had agreed to the consent decree against the background of a 1991 policy announcement by then-Governor William Weld that several DMR facilities would be consolidated and that the Dever School would be closed within three years. *See generally Ricci II,* 781 F.Supp. at 827 & n. 3. So long as equal or better services remain available for each resident elsewhere, the closing

of one residential facility such as Fernald cannot itself constitute a violation of the Disengagement Order.

There is also no basis for a conclusion that the Commonwealth has failed to meet the conditions it agreed to meet as to how it goes about providing care to class members. Centrally, the Commonwealth is required to undertake an ISP process that outlines the services each individual class member needs. *See generally Ricci III*, 823 F.Supp. at 986-87 (Disengagement Order ¶ 2). Again, the record contains no evidence that DMR failed to discharge its ISP duties for any Fernald resident between 2003, when the policy was announced, and 2007. To the contrary, the monitor found that DMR had complied with its obligations in that period.

The district court nevertheless concluded that the Commonwealth's operation of the ISP process against the background of its policy decision to close Fernald constituted a systemic failure. The court reasoned that in announcing its intention to close Fernald, the Commonwealth "eviscerate[d][the] opportunity for fully informed individualized oversight,""dismiss[ed] the benefit of hearing the voices and wishes of those most directly impacted," and "deprive[d] the DMR itself of valuable information, thereby undermining the efficacy of the ISP process." *Ricci IV*, 499 F.Supp.2d at 91. Given that the monitor found

and the court accepted that the transfer of 49 patients after the 2003 announcement fully complied with the Disengagement Order, it cannot follow that the fact of the announcement caused a systemic failure. Indeed, the 2003 announcement was not the first but one of several announcements made of a closing or phase-down of a DMR institution over a 15-year period. The pre-2003 announcements did not cause there to be systemic failures or damage the plaintiffs' ability adequately to participate in the ISP process, nor did the 2003 announcement. The monitor found there had been full compliance with the consent decree as to these earlier closings of facilities.

Further, the Disengagement Order requires the defendants to follow an ISP process but does not predetermine the placement which will result at the end of the ISP process. The Disengagement Order, by its terms, does not guarantee any class member any particular residential placement, nor does it guarantee that Fernald be maintained open so long as any particular resident prefers to remain there.

This, in turn, has several consequences. The removal of one of several available residential facilities which have been found to comply fully with the Disengagement Order cannot itself result in there being a violation of the ISP process. Further, the very nature of the ISP process itself contradicts the district court's conclusion. As the Commonwealth notes, the ISP

process focuses only on the services a resident is to receive; the ISP process does not specify where those services are to be delivered. *See generally* 115 Mass.Code Regs. 6.20-6.25; *cf. Ricci II,* 781 F.Supp. at 827 n. 4 (noting, in discussing ISP process for Dever residents, that "[r]ecommendation [s] as to residential and program placement are based on evaluation of the actual needs of the resident or client rather than on what facilities and programs are currently available").

The Commonwealth also argues that its closing of Fernald could have no effect on the ISP process in the future because the Commonwealth and the class members entered into a stipulation, filed with the court on December 29, 2004, that included an agreement that:

> The Department, its representatives, and employees shall not discuss alternative placement ... for individuals at Fernald during the team meeting convened to develop the individual's annual ISP. The annual ISP meeting shall be limited to the identification and recording of the individual's current needs and supports. The description of an individual's needs and supports as defined in the ISP shall be independent of any discussion regarding where the individual currently lives or what level or type of staffing exists there, and shall be based solely upon professional and direct care assessments done by persons in their assigned roles.

Stipulation at 1, *Ricci IV*, 499 F.Supp.2d 89 (D.Mass.2007) (Nos.72-0469-T, etc.) (citations omitted). As the Commonwealth points out, the stipulation creates even further distance between discussions of placement and the ISP process.

Further, the district court's injunction did not rest on the likelihood that the remaining Fernald residents systemically would be transferred into a location that was not "equal to or better" than Fernald. There is no basis in the record for such a conclusion. The monitor found that the other residential facilities were at least equal to Fernald. Rather, the court concluded that the systemic failure consisted of "[a]dministering [the ISP] process under the global declaration that Fernald will be closed." *Ricci IV*, 499 F.Supp.2d at 91. Under the Disengagement Order, the question of whether a transfer will result in an equal or better placement is separate from the question whether the Commonwealth has correctly implemented the ISP process. The section of the Disengagement Order which deals with transfers states:

> Defendants shall not approve a transfer of any class member out of a state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent

community region) certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, *and that all ISP-recommended services for the individual's current needs as identified in the ISP are available at the new location.*

Ricci III, 823 F.Supp. at 987 (Disengagement Order ¶ 4) (emphasis added). Under the language of the Disengagement Order, a resident may not be transferred to a new location until the Superintendent certifies that the location can satisfactorily provide all ISP-recommended services. This *individualized* process, that the Commonwealth has followed, cannot constitute a " '*systemic* failure' to provide a compliant ISP process." The legal premise for the court's conclusion was in error.

The plaintiff class members have expressed their concerns that the outcome of the ISP process for the remaining Fernald residents will not result in their receiving equal or better services.[FN9] That determination, by its nature, must be made on an individual basis. The Disengagement Order and state regulations provide a procedure and a place where individual disputes about adequacy of the services resulting from the ISP process may be heard. *See generally* 104 Mass.Code Regs. 29.15. Again, the Disengagement Order commits these disputes to resolution in a state forum and under state law and thus provides no basis for federal court

intervention. A resident who is the subject of the ISP process may request a conference and an adjudicatory hearing, which includes procedural safeguards and the right to judicial review in the state Superior Court.

> FN9. Plaintiff Wrentham Association argues that the record shows there was intimidation of residents. Neither the district court nor the monitor found any intimidation during the relevant period and the record does not sustain the accusation.

If in an individual case there is a failure to provide through the ISP process "an individualized and personalized analysis of each resident," a concern expressed by the district court, then the remedy is provided by state regulations, which inform the ISP process. *See generally* 115 Mass.Code Regs. 6.25. This concern then, does not satisfy the conditions for reopening the decree or warrant federal intervention in state proceedings.

The conditions precedent set forth in the Disengagement Order for the court to reopen the case have not been met and the court erred in concluding otherwise.

B. *Whether There Was Authority Under the Modification Doctrine*

In reopening the consent decree, the

district court did not rely on the doctrine that in limited circumstances, consent decrees in institutional reform cases may be modified. In fact, this theory was not advanced before the district court. Several of the briefs advance this modification rationale as an alternative rationale which they argue would support the court's reopening of the decree. Given the significance of this case, we address the question. We hold that the plaintiffs have not met and cannot meet their burden to establish that modification is warranted and that the court thus lacked jurisdiction to modify the consent decree.

In *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992), the Supreme Court set forth the standards that apply when "a party seeks modification of a term of a consent decree that arguably relates to the vindication of a constitutional right." *Id.* at 383 n. 7, 112 S.Ct. 748.The district court can modify the decree only on a showing of a significant change in circumstances. *Id.* at 383, 112 S.Ct. 748. The party seeking modification has the burden of showing "a significant change either in factual conditions or in law." *Id.* at 384.

There is no justification in the modification rationale under *Rufo* to reopen the consent decree.[FN10] There has been no significant change in factual circumstances. The parties, and the Disengagement Order,

recognized that the Commonwealth might choose to close any of the residential facilities, including Fernald. There has also been no significant change in law which would warrant reopening the decree. Indeed, the law has moved in a direction disfavoring institutionalization of residents. The Commonwealth cites *Olmstead* as recognizing that federal law now favors community placement of institutionalized individuals.[FN11] In addition, the Commonwealth notes that the law of neighboring states, including Maine, New Hampshire, and Rhode Island, has moved away from institutionalization completely.

FN10. We do not need to reach the preliminary question of whether the modification doctrine can apply at all when the parties have in a consent decree defined the conditions for reopening.

FN11. Amici, Massachusetts Coalition of Families and Advocates for the Retarded, Inc. and Voice of the Retarded, Inc., filed a brief in this court in support of appellees that argues to the contrary that the core holding of *Olmstead* does not endorse deinstitutionalization but requires an individualized assessment that considers "the views of treatment professionals; the views of the affected individual; and state resources." Amici, the Association of Developmental Disabilities Providers of Massachusetts and others, filed a brief in

support of appellants. They argue that there has been a paradigm shift throughout the nation in favor of deinstitutionalization.

We note but have no need to address these different views.

C. *Whether There Was Authority to Reopen Due to Constitutional Violations*

The plaintiffs argue that there is a separate basis to be found in the Constitution, which would support the district court's assertion of jurisdiction. They argue that there has and will be a violation of the residents' due process rights. The district court wisely did not rely on this ground. There is no basis in the record for this assertion. The record is to the contrary

The plaintiffs allege that "a process that would permit the transfer of residents from Fernald without [allowing them] meaningful participation" violates principles of due process. But the record does not show that there has been a "lack of meaningful participation." The record provides no basis to infer, much less to demonstrate, that there will be a lack of meaningful participation. The monitor made no findings that DMR had prevented residents or guardians involved in transfers between 2003 and 2006 from participating meaningfully in discussions of their transfer. The findings are

that there was full compliance with the Commonwealth's obligations.

D. *Whether Other Grounds Provided Authority to Reopen*

This leaves only the attempt of the plaintiff class to recharacterize the district court's assertion of jurisdiction as an exercise of "ancillary jurisdiction." Plaintiff Wrentham Association makes a related argument that a court has "inherent authority" to enforce its own orders.[FN12] Neither doctrine applies here.

> FN12. The Wrentham Association argues that, in addition to its inherent authority, the district court explicitly retained jurisdiction here. Any jurisdiction retained in the Disengagement Order, however, could be activated only after certain conditions precedent, such as a showing of a systemic failure of the ISP process, were met.

"Ancillary jurisdiction" is a term with a specialized meaning, and the term has no application here. Nor does the court have "inherent authority" to revisit its Disengagement Order. In *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), the Court explained that ancillary jurisdiction can be used for two limited purposes: "(1) to permit disposition by a single court of claims that are, in varying respects and

degrees, factually interdependent ...; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-80, 114 S.Ct. 1673 (citations omitted). In discussing the second purpose, the Court noted that a district court may possess "inherent authority" to address violations of an order where it retains jurisdiction in a separate provision, but only when the order itself is violated. *See id.* at 380-81, 114 S.Ct. 1673. The Court found that neither power justified federal court jurisdiction to revisit a settlement agreement between two parties where the court order did not contain a provision retaining jurisdiction. *Kokkonen* thus stands for the proposition "that district courts enjoy no free-ranging 'ancillary' jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order." *Pigford v. Veneman,* 292 F.3d 918, 924 (D.C.Cir.2002) (citing *Kokkonen,* 511 U.S. at 381, 114 S.Ct. 1673). The district court's ancillary jurisdiction thus did not provide authority to reopen the Disengagement Order absent a showing, not sustainable here, that the terms of the Disengagement Order itself had been violated.

III.

The issue this court decides concerns the limits on the jurisdiction of the federal courts. We do not decide the issue of what path best serves the interests of the residents of Fernald

and the other parties who have a stake in this matter. People of good faith can and do passionately differ about the Commonwealth's intention to close the Fernald Center. We hold only that the district court lacked authority to reopen the consent decree in this case and that it lacked jurisdiction on that or any other basis to reopen and to enter the orders it did.

We *reverse* and direct entry of judgment dismissing with prejudice the claims plaintiffs have brought in this action. In doing so, we also recognize the able stewardship exercised by the district court over the years, which led to the improvement of conditions for the Fernald residents and to the landmark 1993 consent decree.

It is so ordered.

APPENDIX B

District Court Decision

United States District Court, D. Massachusetts.
Robert Simpson RICCI, et al., Plaintiffs,
v.
Robert L. OKIN, et al., Defendants.

Civil Action Nos. 72-0469-T, 75-5023-T, 74-2768-T, 75-5210-T, 75-3910-T.

Aug. 14, 2007.

MEMORANDUM

TAURO, District Judge.

Plaintiff Ricci class members raised allegations that Defendant Department of Mental Retardation ("DMR"), by and through its Commissioner, was failing to comply with this court's Final Order when it transferred Plaintiff class members out of the Walter E. Fernald Developmental Center ("Fernald"). In response, this court appointed U.S. Attorney Michael Sullivan as Court Monitor to investigate whether the DMR's past and prospective transfer of residents out of Fernald was in compliance with this court's 1993 Final Order, and applicable law.

When the court appointed the Court Monitor on February 8, 2006, it ordered all

transfers out of Fernald stayed. More than a year later, on March 6, 2007, the Court Monitor filed his report, a copy of which is attached as an Appendix. This court entered a March 7, 2007 order staying transfers from Fernald, pending consideration of the report and any objections.[FN1]

> FN1. That order was appropriate to prevent irreparable harm to the Plaintiff class while the court considered the matter. *See, e.g., Ricci v. Okin,* 978 F.2d 764, 767 (1st Cir.1992) (Breyer, J.) ("[W]e add that it would not likely benefit the appellants to obtain jurisdiction, for the practical, common sense considerations we have mentioned would balance heavily in favor of permitting a six-month procedurally-necessitated extension of the October 1986 Order's life.").

The DMR has recently filed a *Motion to Dissolve Court's Injunction of February 8, 2006, Barring Transfers from the Fernald Developmental Center.* For the reasons expressed below, the court ALLOWS that motion, and vacates its earlier orders of February 8, 2006, and March 7, 2007. DMR may transfer class member residents from Fernald, subject to the following.

In addition to a complex web of federal and state statutes and regulations that protect the residents of Fernald, those who are *Ricci* class members have the right to demand that the

DMR "not approve a transfer of any class member out of a state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent community region) certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that all ISP-recommended services for the individual's current needs, as identified in the ISP, are available at the new location." [FN2] That right, among others, is contained in the court's so-called Final Order, entered on May 25, 1993.

FN2. *Ricci v. Okin*, 823 F.Supp. 984, 987 (D.Mass.1993). "ISP" stands for Individual Service Plan. *Id.*

The Final Order returned to the DMR the authority to manage and oversee the Commonwealth's facilities. But, it reserved this court's right to intervene if "the defendants substantially fail to provide a state ISP process in compliance with this Order" or "if there is a systemic failure to provide services to class members as described in this Order." [FN3]

FN3. *Id.* at 988.

After more than a year of exhaustive and meticulous study,[FN4] the Court Monitor concluded that the DMR had complied with the Final Order's requirement that transferred

residents obtain "equal or better services." FN5 The Court Monitor also concluded that "Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an 'equal or better' service outcome." FN6 This court shares in these conclusions.

> FN4. The Court Monitor visited DMR intermediate care facilities and community residences throughout the Commonwealth, surveyed day programs, hired independent medical experts, scoured the medical and departmental records of the transferred individuals, and met with officials, guardians, and residents. *See generally,* The Monitor's Report, Paper # 158 (March 6, 2007).
>
> FN5. *Id.* at 14.
>
> FN6. *Id.* at 27.

The DMR objects to the Monitor's second conclusion arguing that, as a matter of federalism, subject matter jurisdiction, and state and federal law, this court should not and cannot decide for the DMR whether Fernald residents can receive equal or better services elsewhere. This court agrees that, in the first instance, it is the responsibility of the DMR to use the ISP process to assess the individual needs of each resident. But, considering the entire record of this case, the Court Monitor's

thorough investigation, as well as more than three decades of personal oversight of the case and the dozens of "views" by this court of the subject facilities,[FN7] this court concludes that the Commonwealth's stated global policy judgment that Fernald should be closed [FN8] has damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis.

> FN7. These views of the facilities in question are admissible evidence in this circuit. *United States v. Gray*, 199 F.3d 547, 550 (1st Cir.1999).
>
> FN8. That the Commonwealth has such a plan is a fact established in the record and acknowledged by the DMR. *See* The Department of Mental Retardation's Response To: (1) the Report of United States Attorney Michael J. Sullivan; and (2) the Court's Order Show Cause Why an Injunction Should Not Enter, Paper # 198, p. 6 (May 31, 2007) ("On February 23, 2003, Governor Romney announced plans to close the FDC.").

Although the transfers that have taken place so far may have been in the best interests of residents who were able to obtain "equal or better services" elsewhere, the Court Monitor's report reaches a conclusion that should be apparent to anyone who has visited Fernald. For some Fernald residents, a transfer "could have

devastating effects that unravel years of positive, non-abusive behavior." [FN9] Of note, the Court Monitor emphasized the importance of simplicity, continuity, and consistency in the surroundings, activities, and caretakers that help residents live each day.[FN10]

FN9. The Monitor's Report, Paper # 158, p. 24.

FN10. *Id.*

An essential function of the ISP process is to give residents and guardians a voice in important decisions.[FN11] It is intended to provide an individual and personalized analysis of each resident. Administering this process under the global declaration that Fernald will be closed, however, eviscerates this opportunity for fully informed individualized oversight.[FN12] To dismiss the benefit of hearing the voices and wishes of those most directly impacted invites the devastating effects about which the Monitor has warned. The DMR declaration not only disenfranchises the participants in the ISP process, it also deprives the DMR itself of valuable information, thereby undermining the efficacy of the ISP process. As a consequence, such administration of the ISP process amounts to a "systemic failure" to provide a compliant ISP process, within the meaning of the Final Order.[FN13]

FN11. *See e.g.*, 115 Mass.Code Regs.

6.20(3)(a)(3) (2007).

FN12. *See Ricci v. Okin,* 781 F.Supp. 826, 827, n. 4 (D.Mass.1992) (describing the ISP process and explaining that "[r]ecommendation[s] as to residential and program placement are based on evaluation of the actual needs of the resident or client rather than on what facilities and programs are currently available").

FN13. The Final Order does not define "systemic." As this court oversaw entry of the Final Order, it is uniquely competent to declare that "systemic" simply was intended to have its plain dictionary meaning-"of or relating to a system." Webster's II New College Dictionary 1120 (2001). Accordingly, a systemic failure need not be catastrophic in and of itself. Rather, it may simply be a problem of any magnitude, which manifests itself on a system-wide basis, across a number of ISP processes.

To remedy this systemic failure, the court reasserts jurisdiction over this case,[FN14] restores it to active status on this court's docket, and enters the following order:

FN14. A district court has jurisdiction to enforce an order where the court retained such jurisdiction when it closed the case.

See Baella-Silva v. Hulsey, 454 F.3d 5, 10 (1st Cir.2006). This court did explicitly retain such jurisdiction in the Final Order. *Ricci*, 823 F.Supp. at 988.

Any further communication from Defendant Commonwealth of Massachusetts Department of Mental Retardation to Fernald residents and their guardians which solicits choices for further residential placement shall include Fernald among the options which residents and guardians may rank when expressing their preferences.[FN15]

FN15. *See* Show Cause Order, Paper # 181 (May 9, 2007).

This order is consistent with controlling precedent.[FN16] It does not mean that the Commonwealth may never close Fernald.[FN17] It does mean, however, that the DMR must carefully assess the needs and wishes of each resident, and provide a genuine and meaningful opportunity for their guardians to participate in their placement decisions. The court is not dictating what the results of future ISP decision processes must be. It simply declares that starting an ISP discussion with the assumption that Fernald is not an available alternative for its residents is not acceptable.

FN16. The DMR asserts that entering such an order would run afoul of the Supreme Court's decision in *Olmstead v.*

Zimring, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999). There, the Court held that transfer out of a state institution and to a community setting "is in order when the State's treatment professionals have determined that community placement is appropriate, *the transfer from institutional care to a less restrictive setting is not opposed by the affected individual,* and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Id.* at 587, 119 S.Ct. 2176 (emphasis added). But this court is not precluding such a transfer. To the contrary, this court is simply ensuring that the DMR use the ISP process to adequately assess whether the setting is appropriate and whether it "is not opposed by the affected individual."

FN17. As the DMR notes, the Consent Decrees entered by this court prior to the Final Order contemplate facility closure. *See Ricci*, 781 F.Supp. at 830 ("The Consent Decrees do not prohibit the possible closing of any facility. Indeed, if residents are properly placed into alternative settings, and a facility is no longer needed, this court will not interfere with its closure."). The court maintains this position. The purpose of today's order is not to interfere with closure, but to

make sure alternative placement decisions properly start with the needs and wishes of the individual resident, rather than an inflexible global closure policy.

The court believes that the Commonwealth's compliance with this order will remedy the systemic failure identified. Accordingly, the case may again be closed. All terms of the court's Final Order, in addition to the order referred to above, remain in effect. The DMR shall continue to have discretion to administer its programs and facilities, subject to the provisions of these orders.[FN18]

FN18. The court would however, encourage the DMR and the Commonwealth to consider alternative proposals for Fernald, such as the one put forward by the Court Monitor at p. 25-26 of his report, which could use the existing capacity and resources available at Fernald to efficiently meet the needs of individuals, as well as the policy priorities of the Commonwealth, without causing the trauma and "devastating effects" that could result from transfers.

Consistent with the Final Order, this court will not review the results of individual ISP processes.[FN19] But, should the laintiff class believe that a systemic failure once again exists, Plaintiffs may follow the procedures set forth in paragraph 7(c) of the Final Order to bring the

matter to the attention of the DMR, and eventually, back before this court.[FN29]

FN19. *Ricci,* 823 F.Supp. at 988 ("Individual ISP disputes shall be enforced solely through the state ISP process.").

FN20. *Id.*

AN ORDER WILL ISSUE.

APPENDIX C

District Court Subsequent Order

United States District Court, D. Massachusetts.
Robert Simpson RICCI, et al., Plaintiffs,
v.
Robert L. OKIN, et al., Defendants.

Civil Action Nos. 72-0469-T, 75-5023-T, 74-2768-T, 75-5210-T, 75-3910-T.

ORDER

After a Hearing held on February 26, 2008, this court hereby orders the following:

1. Plaintiffs' *Motion to Prohibit the Transfer of Residents From the Fernald Developmental Center to Other ICF/MRS and Community Residences Until the Pending Appeal of Ricci et al v. Patrick et al is Decided by the United States Court of Appeals for the First Circuit* [# 243] is DENIED.

2. Defendant Department of Mental Retardation's *Motion to Stay Further Proceedings* [# 245] is DENIED WITHOUT PREJUDICE.

3. Defendant Department of Mental Retardation's *Motion to Strike the Fernald Plaintiffs' Motion to Prohibit Transfer of FDC*

Residents Pending Appeal [# 247] is DENIED.

4. United States Attorney Michael J. Sullivan shall continue as Court Monitor with respect to the above-captioned matter.

a. Mr. Sullivan's responsibility is to advise the court whether the circumstances surrounding the February 13, 2008 transfer of A.T., a 91-year-old, legally blind, hearing impaired, mentally retarded woman, from the Fernald Developmental Center to another facility, complied with the August 14, 2007 Memorandum [# 219] and accompanying Order [# 220] of this court.

b. The Department of Mental Retardation shall grant Mr. Sullivan access to all records and information that may be relevant to his inquiry. Any dispute as to the need for such records, or the need for any protective order, shall be brought to the attention of this court for resolution.

c. Plaintiffs' oral *Motion to Expand the Scope of the United States Attorney's Inquiry into All of the Transfers from Fernald that Occurred After May 14, 2007*, raised in open court at the Hearing, is DENIED.

IT IS SO ORDERED.

APPENDIX D

District Court Disengagement Order

United States District Court, D. Massachusetts.
Robert Simpson RICCI, et al., Plaintiffs,
v.
Robert L. OKIN, M.D., et al., Defendants.

Civ. A. Nos. 72-0469-T, 74-2768-T, 75-3910-T, 75-5023-T and 75-5210-T.

May 25, 1993.

MEMORANDUM

TAURO, Chief Judge.

Twenty-one years ago, I made my first trip to Belchertown, to see for myself the conditions alleged in a class action filed on behalf of the residents there.

To put that time frame in some perspective, I point out that the law clerk who accompanied me that day, Mark Brodin, is now a tenured professor at the Boston College Law School-a rookie Boston lawyer named Bill Weld had passed the bar less than two years earlier-and Kris Brown, the law clerk now working on these cases, was four years old.

Similar actions were later filed on behalf

of the residents of Fernald, Monson, Dever and Wrentham.[FN*] I went to see them all, and the sights, sounds, smells and generally deplorable conditions I witnessed are as vivid in my mind today as they were those many years ago.

> FN* For a detailed exposition of the history of these cases, see *Ricci v. Okin*, 978 F.2d 764 (1st Cir.1992); *Massachusetts Ass'n for Retarded Citizens v. King*, 668 F.2d 602 (1st Cir.1981); *Massachusetts Ass'n for Retarded Citizens v. King*, 643 F.2d 899 (1st Cir.1981); *Ricci v. Okin*, 781 F.Supp. 826 (D.Mass.1992); *Ricci v. Callahan*, 646 F.Supp. 378 (D.Mass.1986); *Ricci v. Callahan*, 576 F.Supp. 415 (D.Mass.1983); *Ricci v. Callahan*, 97 F.R.D. 737 (D.Mass.1983); *Ricci v. Okin*, 537 F.Supp. 817 (D.Mass.1982); Esther Scott, Judge Tauro and Care of the Retarded in Massachusetts (1987) (unpublished case program, Kennedy School of Government, Harvard University).

But, thanks to the healthy tenacity and persistence of the parents, friends and counsel of people with mental retardation-the enlightened leadership of responsible state and federal officials, and the oversight of the Office of Quality Assurance and predecessor Court Monitors-those initial inspection tours became the first steps in a process that has taken people with mental retardation from the snake pit,

human warehouse environment of two decades ago, to the point where Massachusetts now has a system of care and habilitation that is probably second to none anywhere in the world.

For the past two decades, literally thousands of hours have been devoted to fashioning a comprehensive remedial program that has included multi-million dollar capital improvements, establishment of a responsible program of community placement, as well as significant staffing increases geared to meeting the individual service plans and overall needs of those with mental retardation.

The result is that, working together, we have created an environment for persons with mental retardation that is now characterized by human dignity and opportunity for growth. And we have done so in a way that consistently ensured a full measure of value for every tax dollar spent.

Despite this progress, these institutions and the related programs are, of course, not perfect. More needs to be done. And, most important, all concerned, both in the private and governmental sectors, need to be ever vigilant that we do not permit any erosion of the significant progress that has been made.

Given this progress, and the demonstrated good will and dedication of Governor Weld to the mission of safeguarding the health, safety and

well-being of people with mental retardation, I am today signing a comprehensive Order closing the federal court's oversight of these cases.

A key factor in my decision to do so is Governor Weld's commitment to make permanent the historic improvements that have been achieved during the past twenty years-a commitment manifested and memorialized by the Executive Order he is issuing today, creating the Governor's Commission on Mental Retardation.

This Commission will be an independent citizen oversight body whose multi-faceted mandate and authority will include monitoring the quality and effectiveness of the Commonwealth's programs of services designed to address the wide variety of needs of people with mental retardation.

The nine members of the Commission will be selected by the Governor. Three of these members will be nominated by the existing Advisory Panel of the Office of Quality Assurance, thereby providing significant input from those who have been so intimately involved with these cases over the years.

The Commission will be served by a full-time Administrator appointed by the Governor. The Administrator will be a person who has demonstrated knowledge and experience with respect to quality assurance in the delivery of

services to people with mental retardation.

The Commission will have access to all relevant information concerning people with mental retardation. It will serve as an ombudsman to resolve disputes, and it will provide a visible and credible forum to ensure that the Commonwealth fully complies with its obligations to its citizens with mental retardation.

The Commission will work cooperatively with the Department of Mental Retardation, and will serve as a source of valuable advice to the Commissioner and to the Governor with respect to issues affecting the quality of care for persons with mental retardation.

This independent citizen task force, having oversight responsibility for monitoring quality assurance, is the first of its type in the nation. And Governor Weld is to be commended for his foresight and sensitivity in creating this atmosphere of citizen inclusion with respect to the critical responsibility for monitoring the efforts of the Department of Mental Retardation.

I know that Governor Weld will choose the Commission members and the Administrator with great care. To his appointees I repeat something I said in 1982:

> The retarded have no potent political constituency. They must rely on the good

> will of those of us more fortunate than they, and the Constitution which controls the manner in which all of us must meet our varied responsibilities.

Ricci v. Okin, 537 F.Supp. 817, 836 (D.Mass.1982).

My hope is that those words will serve as something of a standard for the Commission members and the Administrator as they assume this important public trust.

An Order will issue.

ORDER

After notice and hearing, and with the consent of the parties, it is hereby ORDERED:

1. This Order supplants and replaces each of the consent decrees and all orders of the court in these matters. All such consent decrees and outstanding orders are hereby vacated and dissolved. These five consolidated cases shall be and hereby are closed and removed from the court's active docket. Any action to enforce the rights of the plaintiff classes may be brought before the court only pursuant to the terms of paragraph 7 below.

2. Defendants shall continue to provide services to the members of the plaintiff class as set forth in this paragraph.

a. Defendants shall substantially provide services to each class member on a lifetime basis. The specific services to be provided to each class member [FN1] to meet this obligation, and defining this obligation, shall be set forth in an Individual Service Plan ("ISP") that details each class member's capabilities and needs for services, pursuant to the regulations governing the preparation of ISP's, as currently set forth in 104 CMR 20, *et seq.* (the "ISP Regulations").[FN2] Such services shall include, as appropriate for the person, residential programs; day programs; recreational and leisure time activities; medical, psychological, dental and health-related professional services; respite care and crisis intervention services; support and generic services, such as guardianship and adaptive equipment services; and transportation services.

FN1. The plaintiff class will be defined as those individuals who have been identified in the Class Member Identification List issued as of April 30, 1993, regardless of their current place or residence, or any person who, on or after April 30, 1993, has resided at a state school during more than 30 consecutive days or for more than 60 days during any twelve-month period. Defendants shall maintain a mechanism for keeping track of the identities and locations of current class members, and the occurrence and history of transfers, which information shall be available to

plaintiffs' counsel. During the first three years following issuance of this Order, defendants shall also transmit notices of the transfer of any class member to a designated representative from that individual's original class. Additionally, notice shall be sent to a representative of the Massachusetts Association of Retarded Citizens of the transfer of any class member from the original Dever and Wrentham classes.

As of this date, admissions to the state schools are closed; however nothing in this Order shall preclude defendants in the future from adopting a different admissions policy, or from modifying the current policy on admissions.

For purposes of this Order, "State School" shall include Belchertown, Dever, Fernald and Wrentham State Schools and Monson Developmental Center.

FN2. These regulations shall guarantee that each class member be provided with the least restrictive, most normal, appropriate residential environment, together with the most appropriate treatment, training, and support services suited to that person's individual needs.

b. Defendants shall not seek to amend,

revise, or otherwise modify the ISP Regulations as they affect class members except upon 60 days written notice to plaintiffs' counsel, with an opportunity for plaintiffs to comment upon the proposed changes. Any amendments must leave in place a process that is at least the substantial equivalent of the regulations currently set forth in 104 CMR 20, *et seq.*, with regard to the definition of the ISP, the individualized nature of the ISP, the existence of an appeal process, and the principles contained in footnotes 2 and 3 herein.

c. Sufficient adequately trained and experienced personnel, as reasonably determined by the Department of Mental Retardation based on professional judgment, shall be available to substantially meet the needs set forth in each class member's ISP.

d. Defendants shall maintain certification of state schools under federal Title XIX of the Social Security Act, 42 U.S.C. §§ 1396, *et seq.*, and maintain compliance with the Department of Mental Retardation's Title XIX obligations with respect to services in the community, for as long as the state participates in those programs for each facility or service as to which the state receives Title XIX funds.

e. Within nine months of the date of this Order, defendants shall enter into an agreement with contracted consultant retardation professionals or with a nationally recognized

evaluation group to review community programs on a periodic basis.

3. a. Defendants shall continue to use the Single Standard Methodology for staffing state schools for five months, or until the implementation of an alternative staffing plan pursuant to the procedures set forth in subparagraph 3(b) below, whichever is later.

b. If the defendants wish to discontinue use of the Single Standard Methodology, defendants shall provide to the Governor's Commission on Mental Retardation for its review during at least one meeting an alternative staffing plan that will assure the presence of adequate numbers of appropriately trained staff at each state school sufficient to meet the needs of the individuals who continue to reside there. This alternative staffing plan shall be formulated by the Department of Mental Retardation based on its reasonable, professional judgment and may or may not utilize specific ratios for staff.

4. Defendants shall not approve a transfer of any class member out of a state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent community region) certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that

all ISP-recommended services for the individual's current needs as identified in the ISP are available at the new location.

5. Except as set forth in other paragraphs of this Order, nothing in this Order is intended to detract from or limit the discretion of the defendants in developing and improving programs, managing and determining the personnel and budget of the Department of Mental Retardation and other state agencies, implementing innovative services, improving quality enhancement and dispute-resolution mechanisms, or allocating its resources to ensure equitable treatment of its citizens.

6. Defendants shall continue to seek to improve, and shall not undermine, the progress achieved during the period of this litigation by:

a. Maintaining and implementing the basic principles of the ISP.[FN3]

FN3. These principles, currently in Department of Mental Retardation regulations, are "(1) human dignity, (2) humane and adequate care and treatment, (3) self-determination and freedom of choice to the person's fullest capacity, (4) the opportunity to live and receive services in the least restrictive and most normal setting possible, (5) the opportunity to undergo normal developmental experiences, even though

> such experiences may entail an element of risk, provided however that the person's safety and well-being shall not be unreasonably jeopardized, and (6) the opportunity to engage in activities and styles of living which encourage and maintain the integration of the client in the community through individualized social and physical environments."

b. Exerting their best efforts to maintain and secure sufficient funds to meet the needs of class members under this Order. The defendants shall be determined to have met their obligation under this subparagraph if the defendants have secured and maintained an annual appropriation for the Department of Mental Retardation at least equal to the total gross amount of the actual appropriations for Fiscal Year 1993.[FN4]

> FN4. This amount shall be set as follows: Within 14 days of the final appropriation for the Department of Mental Retardation for Fiscal Year 1993, the defendants shall file with the court a certification of the total gross amount of actual appropriations for the Department of Mental Retardation for Fiscal Year 1993 which shall constitute an appendix to this Order and shall be incorporated herein by reference.

7. a. If the defendants substantially fail to provide a state ISP process in compliance with

this Order, or if there is a systemic failure to provide services to class members as described in this Order, the plaintiffs may seek enforcement of the Order pursuant to this paragraph. Individual ISP disputes shall be enforced solely through the state ISP process.

b. Nothing in this Order shall make state law (including but not limited to the ISP regulations) enforceable in federal court, but claims of a failure to provide an ISP process in compliance with this Order or claims of systemic failure to provide ISP services required by this Order may be enforced in this court, even if such claims also state a violation of state law.

c. Should the plaintiff class believe that the defendants are not in substantial compliance with this Order with regard to systemic issues, plaintiffs may seek to reopen this case and to restore this case to the active docket and to move for enforcement of this Order only after the following steps have occurred: [FN5] (1) plaintiffs have given written notice to defendants of the alleged non-compliance, including the facts alleged and the provision of the Order involved; (2) defendants have been provided with 30 days to review and respond to plaintiffs' notice, and to inform plaintiffs of any proposed plan of correction; (3) plaintiffs and defendants (or their respective counsel) have met personally at least twice to discuss and seek to resolve any remaining dispute under the notice. The court shall have jurisdiction to enforce the provisions

of this Order pursuant to this paragraph, which shall be the exclusive means of enforcing this Order.

> FN5. The procedures required by this subparagraph will apply except in a situation where serious irreparable harm would result if all the requirements were met; in such a situation, plaintiffs shall give the maximum practical notice and the parties shall comply with all the requirements to the extent possible, given the urgency of the situation.

d. The matters which may be raised under subparagraph 7(a) above are assertions of future systemic violations of this Order. Nothing in this paragraph 7 shall be construed to prevent a class member from bringing an independent action in the event that the individual's grievances have not been remedied through existing state procedures.

e. Plaintiffs may not seek to reopen this case based solely on facts known by them as of the date of this Order. Plaintiffs may, however, use existing facts in connection with any assertions of future systemic violations of this Order.

8. This Order shall take effect upon written notification to the court by the Governor that he has issued the Executive Order set forth in Appendix A, which is attached hereto and

incorporated herein, and that all members of the Governor's Commission on Mental Retardation have been sworn and the Administrator has been appointed.[FN6] The Advisory Panel of the Office of Quality Assurance shall submit its list of Commission member nominees to the Governor within 30 days of the signing of this Order.

> FN6. Once this Order takes effect, the Office of Quality Assurance shall limit its activities to those necessary to transfer its files to the Governor's Commission. It is understood that the Office shall cease all operations upon the appointment of the Administrator of the Commission, or on June 30, 1993, whichever event later occurs.

9. Defendants shall place the following information describing the rights and services under this Order in the permanent record of each class member, shall retain such information on record for so long as the class member is alive, and shall seek to enter such information in the class member's file maintained by all providers of services to class members (and, within one year, by contract require such entry by providers):

a. designation of class membership;

b. notation that class membership results in rights and services guaranteed by this Order, and a summary of those rights; and

c. the name, address and telephone number of plaintiffs' counsel, various advocacy organizations, the Department of Mental Retardation, and the Governor's Commission.

The above information shall be reviewed with each class member at that individual's next scheduled ISP meeting following the effective date of this Order.

IT IS SO ORDERED.

APPENDIX A

THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE DEPARTMENT

STATE HOUSE BOSTON 02133

(617) 727-3600

BY HIS EXCELLENCY

WILLIAM F. WELD

GOVERNOR

EXECUTIVE ORDER NO. 356

GOVERNOR'S COMMISSION ON MENTAL RETARDATION

WHEREAS, it is the responsibility of the Commonwealth to safeguard the health, safety and well-being of its citizens with mental retardation; and

WHEREAS, it is the responsibility of the Commonwealth to ensure that the system of services for people with mental retardation never regresses to the deplorable and degrading conditions of the past; and

WHEREAS, the Commonwealth desires to make permanent the historic improvements in the care of people with mental retardation that were brought about by those who found the conditions of the past utterly unacceptable; and

WHEREAS, the Commonwealth recognizes the value inherent in its receiving ideas and maintaining communication with family members, advocates, public officials, and other members of the public interested in enhancing the well-being of people with mental retardation; and

WHEREAS, it is important that people with mental retardation, their families and the public, be provided with a forum for discussion and resolution of disputes that may otherwise not be addressed by the Department of Mental Retardation pursuant to its statutory responsibilities; and

WHEREAS, it is the responsibility of the Commonwealth to educate the general public as to the potential of people with mental retardation to make meaningful contributions to the communities in which they reside; and

WHEREAS, people with mental retardation must have opportunities to make choices with respect to their future, and to influence the course of public policy as it affects such choices; and

WHEREAS, presence and participation in community life are valued aspirations for people with mental retardation, as they are for all citizens of the Commonwealth; and

WHEREAS, the Commonwealth's network of individualized services designed to address the wide variety of needs of people with mental retardation must be continually evaluated and monitored to ensure its quality and effectiveness;

NOW, THEREFORE, I, William F. Weld, Governor of the Commonwealth, by virtue of the authority vested in me as Supreme Executive Magistrate, do hereby establish the Governor's Commission on Mental Retardation, as follows:

ARTICLE I. *Purpose and Scope of Commission*

1.1 The purpose of the Commission shall be:

(a) to monitor the quality and effectiveness of the Commonwealth's program of services designed to address the wide variety of needs of people with mental retardation;

(b) to discuss and resolve, to the extent practicable, individual and systemic disputes raised by individuals with mental retardation, their families or guardians, for which no other forum exists, or which have not been adequately resolved by existing avenues of redress;

(c) to provide a visible and credible forum for the review of public policy as it affects persons with mental retardation, and to ensure that the Commonwealth fully complies with its obligations to meet their special needs;

(d) to inform the public, as well as those at the highest levels of state government, whenever the Commonwealth has failed in its obligations to its citizens with mental retardation;

(e) to work cooperatively with the Department of Mental Retardation in an effort to support the Department's mission to serve people with mental retardation, and to act as an advocate for the Department, with the public and those within state government, for the purpose of ensuring the quality and effectiveness of Department programs designed to achieve its mission; and

(f) to support and review implementation of the

recommendations of the Commission made pursuant to its responsibilities under 1.1(b) above, after discussion with and receipt of information from the Commissioner of Mental Retardation and other concerned individuals and organizations.

ARTICLE II. *Membership and Structure of Commission*

2.1 The Commission shall consist of nine (9) members appointed by the Governor. Members will be appointed for a term of three (3) years.

2.2 At least three members shall be appointed from a list of not less than twelve (12) nominees submitted to the Governor by the Advisory Panel of the Office of Quality Assurance.

2.3 The Governor shall appoint a Chair of the Commission from among its members.

2.4 Members of the Commission shall consist of persons with demonstrated interest, experience, and expertise in mental retardation. No employee of the Department of Mental Retardation, or its contractors, may be a member of the Commission. Members shall be considered to be special state employees and subject to the provisions of General Laws ch. 268A.

2.5 Members of the Commission shall

serve without compensation, but shall be reimbursed for necessary expenses incurred in the performance of their duties.

2.6 Members of the Commission may be removed by the Governor for good cause shown, including but not limited to failure to attend Commission meetings, as evidenced by absence from three or more Commission meetings in any one calendar year. Voting by proxy or absentee ballot shall not be permitted at Commission meetings, or otherwise in the work of the Commission.

2.7 Vacancies in the membership of the Commission shall be filled promptly by the Governor. Whenever a vacancy occurs in any of the three positions originally appointed from the list submitted by the Advisory Panel of the Office of Quality Assurance, the Governor shall appoint a successor from a list of four (4) candidates submitted by a nominating committee established for the express purpose of filling such vacancies. This nominating committee shall consist of six (6) members and shall be constituted as follows: one representative from each of the four state school parents associations (Dever, Fernald, Monson, Wrentham), one representative from Advocacy Network, Inc., and one representative from the Massachusetts Association for Retarded Citizens.

2.8 There shall be a full-time Administrator of the Commission who shall be

selected by the Governor. The Administrator shall be an employee of the Commonwealth, and shall be compensated for the performance of his or her duties. The Administrator shall have full knowledge of the mental retardation service system and agencies delivering such service and have demonstrated experience in administration and quality assurance. The Administrator shall hold no other public office.

ARTICLE III. *Powers and Duties of Commission Generally*

3.1 The Commission shall adopt such internal procedures as are appropriate for the effective performance of its duties. Decisions of the Commission shall be by majority vote of those present, with a quorum of seven members present required for such decisions. Any procedural issues that may arise during Commission meetings shall be resolved by reference to Robert's Rules of Order.

3.2 The Commission shall hold public hearings, in Boston and at such other locations as it shall determine, from time to time, but in no event less than semi-annually. The subject of such hearings shall include, but shall not be limited to: the quality of the health, safety and well-being of the Commonwealth's citizens with mental retardation; the quality of publicly-funded services available to such citizens; and the extent to which the private sector and the community at large provide opportunities for

persons with mental retardation. The results of such hearings shall be reported to the Commissioner of the Department of Mental Retardation, the Secretary of the Executive Office of Health and Human Services, and the Governor.

3.3 The Commission, the Administrator, or any person they may designate, shall have access at any and all reasonable times to any retardation facility, residence, program, or part thereof, and to all relevant records, reports, materials, and employees, in order to allow them to enhance their appreciation of the needs of persons with mental retardation, and to monitor the quality with which such needs are being met.

3.4 The Commission may make recommendations to the Governor as to how the quality of life of citizens with mental retardation may be improved by legislation and/or regulations.

3.5 The Commission, and/or the Administrator, may, from time to time, issue reports on matters affecting the health, safety and well-being of persons with mental retardation, including reports on the results of activities conducted in accordance with 3.3 above, and may make recommendations for corrective action in response to findings concerning those activities, as well as to complaints that have been reviewed in accordance with Article IV, below. The agencies

to which these reports and/or recommendations are directed shall respond to the Commission within a reasonable time frame.

ARTICLE IV. *Commission's Powers to Serve as Ombudsman and to Resolve Disputes*

4.1 (a) The Administrator, acting on behalf of the Commission, shall be empowered to receive complaints concerning the provision of services to persons with mental retardation that have not been resolved, within a reasonable time, at the local level, or at the level of the Department of Mental Retardation. Prior to presenting a matter for review by the Commission, the Administrator shall consider whether the complaint can be resolved through conciliation. If so, the Administrator shall implement conciliation discussions. In every case, the Administrator shall ensure that the Department of Mental Retardation has had a full opportunity to resolve the matter prior to presentation of the matter to the Commission.

(b) The Commission shall not, in the first instance, consider complaints concerning matters that should be addressed pursuant to: (i) statute or regulations concerning Individual Service Plans; (ii) regulations requiring complaint investigation by the Department; (iii) statutes or regulations governing abuse or neglect of persons with mental retardation; or (iv) any matter for which there exists another mechanism instituted by law for the purpose of

addressing the complaint. The Administrator, however, may monitor the processing of such complaints to determine whether the complainant has made full use of existing procedures, and if not, fully inform complainant of such procedures. If the matter has not been resolved pursuant to the procedures described in (i) through (iv) above, or the Administrator's conciliation effort has not resolved the matter, then the Administrator may refer the complaint to the Commission for its review.

(c) The Commission shall not consider complaints from employees of the Department of Mental Retardation when the matter complained of is the proper subject of union grievance proceedings, civil service laws, or other processes designed to deal with conditions of employment.

4.2 In responding to a complaint, or in the performance of their duties as outlined in the preceding Articles, the Commission, its Administrator, or their designee may request and obtain such information from agencies of the Commonwealth as is necessary to perform their duties, unless otherwise prohibited by law,[FN1] including:

FN1. The Department of Mental Retardation has determined that disclosure to the Commission of otherwise confidential information about its consumers shall be in the consumers' best interest and therefore shall not be

prohibited by law.

(a) information, data, and reports generated by the existing quality assurance mechanism of the Department of Mental Retardation;

(b) information, data, and reports generated by the Health Care Financing Administration or other federal or state agencies pursuant to Title XIX or other federal statutes or regulations; and

(c) information, data, and reports generated as a result of investigations conducted by the Department of Mental Retardation, the Department of Public Health, the Disabled Persons Protection Commission, the Inspector General's Office, or any other state agency.

4.3 The Commission, its Administrator, or their designee may also:

(a) visit, inspect, and make firsthand appraisals of mental retardation facilities, residences, and programs, with specific attention to the safety, security, and quality of care provided;

(b) evaluate information and reports from consumers, their families or representatives, or others, regarding the effectiveness and adequacy of services and quality assurance mechanisms; and

(c) monitor facilities, residences, and programs for the purpose of determining whether problems that have been the subject of past complaints have been rectified.

4.4 The Commission and its designees shall be bound by any limitations on the use or release of information imposed by law upon the party furnishing such information to the Commission and its designees.

4.5 The Commission shall be empowered to mediate and to recommend resolution of disputes between the Department of Mental Retardation and those it serves. In such cases, the Commission may act only after it has, by majority vote, directed the Administrator to bring the matter to the attention of the Commissioner of the Department of Mental Retardation for a response, and has determined that no adequate remedy has been forthcoming to address the matter in dispute.

4.6 If the Department of Mental Retardation fails to implement a mediated agreement or recommended resolution reached pursuant to 4.1 above, after notice to the Commissioner who shall be provided with an opportunity to respond, the Commission is authorized to make recommendations directly to the Governor concerning the matter at issue. Such recommendations to the Governor shall be public information.

4.7 The Administrator shall coordinate the mediation and dispute resolution functions of the Commission. Twice annually, the Administrator shall issue an analysis of cases brought to the Commission's attention. Such analysis shall be provided by the Commission to the Governor, the Secretary of the Executive Office of Health and Human Services, and to the Commissioner of the Department of Mental Retardation. This analysis shall be public information.

ARTICLE V. *Miscellaneous*

5.1 To maximize its capability of realizing its mission, the Commission shall be located in the office of the Governor, and shall report directly to the Governor.

5.2 The Commission and the Administrator shall be provided with staff, secretarial support and other resources necessary to meet their responsibilities. A first Annual Budget for these purposes is attached as an appendix.

5.3 The quality assurance processes of the Department of Mental Retardation and the Commission shall work collaboratively for the benefit of people with mental retardation.

5.4 The Commission, including the Administrator and its staff, shall exist for three years commencing from the date all members

and the Administrator are fully sworn. Six months prior to the end of this three year term, the Commission, in consultation with the Administrator, shall make a recommendation to the Governor as to whether the continued existence of the Commission is advisable to assure quality of services and protection of rights for people with mental retardation.

Given at the Executive Chamber in Boston this 25 day of May in the year of our Lord one thousand nine hundred and ninety-three.

/s/ William F. Weld

William F. Weld, Governor

Commonwealth of Massachusetts

/s/ Michael Joseph Connolly

Michael Joseph Connolly

Secretary of the Commonwealth

GOD SAVE THE COMMONWEALTH OF MASSACHUSETTS

EXHIBIT A

First Year Budget

This document describes the total first year budget that will be requested for the

Commission on Mental Retardation, the staffing and other expenses which it would cover, and the principles which will guide the implementation of the budget.

Amount of Budget. The first year budget for the Commission on Mental Retardation will be $200,000. To the extent this amount is insufficient to fully fund the non-personnel requirements of the Commission, the Executive Office of Health and Human Services, the Department of Mental Retardation, and other appropriate state agencies shall provide additional funds or support as are needed to allow for travel, equipment (including computer equipment and programs), supplies, telephones, and photocopying. Any such additional support shall be provided in accordance with applicable state laws and procedures.

Adjustments to Budget. It is recognized that the needs of the Commission may change, based on its experience in the first year. For the second and subsequent years, the amount to be requested from the Legislature will be re-evaluated and adjusted as necessary, taking into consideration any recommendations of the Commission, the actual and anticipated workload of the staff, and to assure the accomplishment of the Commission's purposes. Any comments or suggestions from the Plaintiffs' counsel will be considered as well.

Staffing. The professional staff of the

Commission will consist of from two to four professional staff, plus support staff. Professionals must have knowledge of the mental retardation service system and related agencies, and demonstrated experience in the field of mental retardation. Also, it is expected that graduate and undergraduate students in intern and extern programs will be attracted through formal arrangements with institutions of higher learning to assist the professional staff. The first year would begin with at least two professional staff (the Administrator and an Assistant Administrator are anticipated), both full-time, with a full-time secretary. The number and nature of the staff will depend on the qualifications, and salary needs, of the persons hired, considered together with the non-personnel needs of the Commission. Benefits would be approximately 28% of the total salary amounts.

Transition. Orientation and transition briefings and assistance will be provided to the professional staff, and to the Commission, by the Department of Mental Retardation and, it is expected, by the Office of Quality Assurance. No cost would be incurred for this transitional assistance.

Commission Member Expenses. The minimum cost expected for Commission members for reimbursement of expenses is $5,832. This would include $120 per member for parking ($10/member x 12 potential monthly

meetings): $528 per member for travel (200 miles @ $.22/mile x 12 meetings). Total: $648 per member x 9 members = $5,832.

Other Costs. *Staff travel* is expected to be in the range of $1,960 (assuming 9,000 miles at $.22 per mile). *Office space* will be sought in an existing state-owned building so that space costs may be avoided. *Equipment and supplies* are expected to be in the range of $6,300. Computer equipment and appropriate computer programs will be provided. Additional costs would be incurred for telephone and photocopy, as well as for transcription for any hearings or formal proceedings: these costs would likely total in the $7,000 to $10,000 range. Costs for *consultants* to the Commission would be charged to the Commission budget or, when appropriate and agreed to, might be shared with DMR or other state agencies.

Cooperation With Other State Agencies. As the Executive Order states, Par. 1.1(e), the Commission is expected to "work cooperatively with the Department of Mental Retardation ... in support of the Department's mission ... and act as an advocate for the Department, with the public and those within state government ...". To that end, it is expected that the Governor's Office, EOHHS, DMR and other agencies will join with the Commission to assist it to maximize the effectiveness of its work and its budget.

APPENDIX E

Amended Judgment
First Circuit Court of Appeals

United States Court of Appeals, First Circuit.
Robert Simpson RICCI, et al., Plaintiffs, Appellees,
v.
Deval L. PATRICK, in his capacity as Governor of the Commonwealth of Massachusetts, et al., Defendants, Appellants.

No. 07-2522,

Massachusetts Association for Retarded Citizens, Inc., a/k/a Arc/Massachusetts, Inc., et al., Plaintiffs, Appellants,
Disability Law Center, Inc., Intervenor, Appellant,
v.
Deval L. Patrick, in his capacity as Governor of the Commonwealth of Massachusetts, et al., Defendants, Appellants.

No. 07-2523.

AMENDED JUDGMENT

Entered: November 18, 2008

This cause came on to be heard on appeal from the United States District Court for the

District of Massachusetts and was argued by counsel.

The orders of the District Court dated August 14, 2007 and February 27, 2008 are reversed and we direct entry of judgment that all claims made which resulted in the issuance of those orders be dismissed with prejudice to their renewal in federal court proceedings. The 1993 Disengagement Order remains in full force and effect.

By the court

/s/ Richard Cushing Donovan, Clerk